UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

In Re: Highland Capital Management, L.P.	§	Case No. **19-34054-SGJ-11**
Hunter Mountain Investment Trust		
Appellant	§	
vs.	§	
Highland Capital Management, L.P, et al	§	**3:23-CV-2071-E**
Appellee	§	

[3904] Order Pursuant to Plan "Gatekeeper Provision" and Pre-Confirmation "Gatekeeper Orders" Denying Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding. Entered on 8/25/2023.

Volume 39

APPELLANT RECORD

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	**Chapter 11**
	§	
	§	**Case No. 19-34054-sgj11**
Reorganized Debtor.	§	

INDEX

APPELLANT HUNTER MOUNTAIN INVESTMENT TRUST'S SECOND SUPPLEMENTAL STATEMENT OF THE ISSUES AND DESIGNATION OF ITEMS FOR INCLUSION IN THE APPELLATE RECORD

COMES NOW Appellant/Movant Hunter Mountain Investment Trust, both in its individual capacity and derivatively on behalf of the Reorganized Debtor, Highland Capital Management, L.P., and the Highland Claimant Trust,[1] (collectively, "Appellant" or "HMIT"), and files this Second Supplemental[2] Statement of the Issues and Designation of Items for Inclusion in the Appellate Record pursuant to Federal Rule of Bankruptcy Procedure 8009(a)(1):

I.
STATEMENT OF THE ISSUES

A. Did the bankruptcy court err in determining that the "colorable" claim analysis allowed the court to consider evidence and other non-pleading materials including, but not limited to, the court's reasoning that:

1. the colorability analysis is stricter than a non-evidentiary, Rule 12(b)(6)-type analysis;

2. the colorability analysis is "akin to the standards applied under the … *Barton* doctrine";

3. the colorability analysis requires a "hybrid" of the *Barton* doctrine and "what courts have applied when considering motions to file suit when a vexatious litigant bar order is in place"; and/or,

[1] And in all capacities and alternative derivative capacities asserted in HMIT's Emergency Motion for Leave to File Verified Adversary Proceeding [Dkt. Nos. 3699, 3815, and 3816] ("Emergency Motion"), the supplement to the Emergency Motion [Dkt. No. 3760], and the draft Complaint attached to the same [Dkt. No. 3760-1].

[2] Appellant files this Second Supplement pursuant to the Clerk's request at Docket #3949 and correspondence on 10/23/2023.

4. "[t]here may be mixed questions of fact and law implicated by the Motion for Leave"?

[*See* Dkt. Nos. 3781, 3790, 3903-04].

B. Did the bankruptcy court err in determining that Appellant lacked constitutional or prudential standing to bring its claims in its individual and derivative capacities?

[*See* Dkt. Nos. 3903-04].

C. Did the bankruptcy court err in alternatively determining that, even under a non-evidentiary, Rule 12(b)(6)-type analysis, Appellant did not assert colorable claims including, but not limited to, determining that:

1. Appellant's allegations are conclusory, speculative, or constitute "legal conclusions";

2. Appellant's claims or allegations are not "plausible";

3. Appellant's allegations pertaining to a *quid pro quo* are "pure speculation";

4. Proposed Defendant James P. Seery ("Seery") owed no duty to Appellant in any capacity as a matter of law;

5. Appellant failed "to allege facts in the Proposed Complaint that would support a reasonable inference that Seery breached his fiduciary duty to HMIT or the estate as a result of bad faith, self-interest, or other intentional misconduct rising to the level of a breach of the duty of loyalty";

6. Appellant's allegations pertaining to its aiding and abetting and conspiracy claims are speculative and not plausible;

7. The remedies of equitable disallowance and equitable subordination are not remedies "available" to Appellant as a matter of law;

8. Appellant's unjust enrichment claim is invalid as a matter of law because "Seery's compensation is governed by express agreements";

9. Appellant is not entitled to declaratory relief because it has no colorable claims; and/or

10. Appellant cannot recover punitive damages for its breach of fiduciary duty claim?

[*See* Dkt. Nos. 3903-04].

D. Alternatively, even if the bankruptcy court correctly determined that its "hybrid" *Barton* analysis controls, did the court violate Appellant's due process rights by denying Appellant its requested discovery?

[*See* Dkt. Nos. 3800, 3853, 3903-04, June 8, 2023 Hearing].

E. Alternatively, did the bankruptcy court err by denying Appellant's requested discovery including, but not limited to:

1. ordering that Appellant could not request or obtain any discovery other than a deposition of Seery and James D. Dondero; and/or

2. determining that state court "Rule 202" proceedings supported the denial of discovery?

[*See* Dkt. Nos. 3800 & June 8, 2023 Hearing; *see also* Dkt. Nos. 3903-04].

F. Alternatively, did the bankruptcy court err by denying Appellant's alternative request for a continuance to obtain the requested discovery?

G. Alternatively, did the bankruptcy court err by excluding Appellant's evidence, or admitting the same for only limited purposes, offered at the June 8, 2023 Hearing?

H. Alternatively, did the bankruptcy court err by overruling Appellant's objections to Appellees' evidence offered at the June 8, 2023 Hearing?

I. Alternatively, did the bankruptcy court err by excluding Appellant's experts' testimony?

[*See* Dkt. No. 3853; *see also* Dkt. Nos. 3903-04].

J. Alternatively, did the bankruptcy court err by striking Appellant's proffer of its excluded experts' testimony from the record?

[*See* Dkt. No. 3869].

K. Alternatively, if the bankruptcy court correctly determined that its "hybrid" *Barton* analysis controls, did the bankruptcy court err in determining that Appellant had not asserted colorable claims under that "hybrid" analysis including, but not limited to, its findings that:

1. there is no evidence to support that Seery shared material non-public information with the Claims Purchasers;

2. there is no evidence to support the alleged quid pro quo;

3. the material shared was *public* information; and/or

4. the Claims Purchasers had sufficient and lawful reasons to pay the amounts paid

for the purchased claims.

[*See* Dkt. Nos. 3903-04].

L. Did the bankruptcy court err in finding that Appellant is controlled by Dondero, and, as such, Appellant "cannot show that it is pursuing the Proposed Claims for a proper purpose"?

M. Alternatively, does sufficient evidence support the bankruptcy court's evidentiary findings made pursuant to its "hybrid" *Barton* analysis?

N. Did the bankruptcy court err in denying an expedited hearing on Appellant's Motion for Leave? [*See* Dkt. 3713].

O. Does the bankruptcy court's use of a new "colorability" standard to determine if claims by non-debtors against other non-debtors may proceed violate *Stern v. Marshall* and its progeny?

P. Did the bankruptcy court err in denying Appellant's Motion to Alter or Amend Order, to Amend or Make Additional Findings, for Relief from Order, or Alternatively, for New Trial under Federal Rules of Bankruptcy Procedure 7052, 9023, and 9024 including, but not limited to by:

1. declining to consider disclosures that demonstrated that Appellant is "in the money"—an issue pertinent to the court's erroneous standing decisions; and

2. concluding that the disclosures failed to reinforce Appellant's standing to pursue the claims presented?

[Dkt. 3936].

II.
DESIGNATION OF ITEMS FOR INCLUSION IN THE APPELLATE RECORD

Vol. 1

1. Notice of Appeal

000001 **a.** Notice of Appeal **[Dkt. 3906];**

000276 **b.** Amended Notice of Appeal **[Dkt. 3908];** and

000551 **c.** Second Amended Notice of Appeal **[Dkt. 3945]**

2. The judgment, order, or decree appealed from:

a. Memorandum Opinion and Order Pursuant to Plan "Gatekeeper Provision" and Pre-Confirmation "Gatekeeper Orders": Denying Hunter Mountain Investment

000835
000940

Trust's Emergency Motion for Leave to File Adversary Proceedings **[Dkts. 3903 & 3904];** and

001045

b. Order Denying Motion of Hunter Mountain Investment Trust Seeking Relief Pursuant to Federal Rules of Bankruptcy Procedure 7052, 9023, and 9024 **[Dkt. 3936]**.

3. Docket sheet.

001049

a. Bankruptcy Case No. 19-34054

4. Other Items to be included:

a. HMIT hereby designates the following items in the record on appeal from Cause No. 19-34054-sgj11:

Vol. 2

FILE DATE	DOCKET NO. (INCLUDING ALL ATTACHMENTS AND APPENDICES)	DESCRIPTION
01/22/2021	1808	Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified)
02/22/2021	1943	Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief
09/09/2022	3503	Motion to Conform Plan filed by Highland Capital Management, L.P.
02/27/203	3671	Memorandum Opinion and Order on Reorganized Debtor's Motion to Conform Plan
03/28/2023	3699 (3699-1 — 3699-5)	HMIT Emergency Motion for Leave to File Verified Adversary Proceeding and Attached Verified Adversary Complaint
03/28/2023	3700 (3700-1)	HMIT Motion for Expedited Hearing on Emergency Motion for Leave to File Verified Adversary Proceeding
03/30/2023	3704	Farallon, Stonehill, Jessup and Muck Objection to Motion for Expedited Hearing
03/30/2023	3705	HMIT Amended Certificate of Conference

001594
001660
001821
001830
Vol. 3
001849 Thru Vol. 4
Vol 4
002236
002243
002248

Vol. 5

002251	03/30/2023	3706	HMIT Amended Certificate of Conference
002254	03/30/2023	3707	Highland's Response in Opposition to Emergency Motion for Leave
002262	03/30/2023	3708 (3708-1 — 3708-8)	Declaration of John Morris in Support of the Highland Parties' Objection to Hunter Mountain Investment Trust's Opposed Application for Expedited Hearing on Emergency Motion for Leave to File Verified Adversary Proceeding
002346	03/31/2023	3712	HMIT Reply in Support of Application for Expedited Hearing
002355	03/31/2023	3713	Order Denying Motion for Expedited Hearing
002358	04/04/2023	3718 (3718-1 — 3718-4)	HMIT Motion for Leave to File Appeal
002391	04/04/2023	3719 (3719-1)	HMIT Motion for Expedited Hearing on Motion for Leave to File Appeal
002398	04/05/2023	3720	Order Denying HMIT's Opposed Motion for Expedited Hearing
002400	04/05/2023	3721 (3721-1 — 3721-2) Thru Vol. 7	HMIT Notice of Appeal
Vol. 8 002826	04/06/2023	3726 (3726-1) thru Vol. 9	Certificate of Mailing regarding HMIT Notice of Appeal
Vol. 9 003257	04/07/2023	3731	Notice of Docketing Transmittal of Notice of Appeal
003260	04/13/2023	3738 (3738-1)	Highland's Opposed Emergency Motion to Modify and Fix a Briefing Schedule and Set a Hearing Date with Respect to HMIT's Emergency Motion for Leave
003270	04/13/2023	3739	Highland's Motion for Expedited Hearing
003278	04/13/2023	3740	Joinder to Highland's Emergency Motion to Modify and Fix Briefing Schedule and Set Hearing Date With Respect to Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding filed by Farallon

		Capital Management, LLC, Jessup Holdings LLC, Muck Holdings LLC, Stonehill Capital Management LLC
04/13/2023	3741	Notice of Hearing for 04/24/2023 at 1:30 PM
04/13/2023	3742	Amended Notice of Hearing for 04/24/2023 at 1:30 PM
04/13/2023	3745	Notice of Appearance and Request for Notice by Omar Jesus Alaniz filed by James P. Seery Jr.
04/15/2023	3747	Joinder by James P. Seery Jr. to Highland's Emergency Motion to Modify and Fix Briefing Schedule and Set Hearing Date with Respect to Hunter Mountain Investment Trusts Emergency Motion for Leave to File Verified Adversary Proceeding
04/17/2023	3748	HMIT's Response and Reservation of Rights
04/19/2023	3751	Notice of Status Conference
04/21/2023	3758	HMIT's Objection Regarding Evidentiary Hearing and Brief Concerning Gatekeeper Proceedings Relating to "Colorability"
04/21/2023	3759	HMIT's Notice of Rescheduling Hearing
04/21/2023	3761	HMIT's Objection Regarding Evidentiary Hearing and Brief Concerning Gatekeeper Proceedings Relating to "Colorability"[3]
04/23/2023	3760 (3760-1)	HMIT's Supplement to Emergency Motion for Leave to File Verified Adversary Proceeding and Attached Verified Adversary Complaint
04/25/2023	3765	Transcript of Hearing held on 04/24/2023
05/11/2023	3780	Objection to Hunter Mountain Investment Trust's (i) Emergency Motion for Leave to File Verified Adversary Proceeding; and (ii) Supplement to Emergency Motion for Leave to File Verified Adversary Proceeding filed by Farallon Capital Management, LLC, Jessup Holdings LLC, Muck

Vol. 10
003281
003286
003291
003294
003296
003299
003302
003311
003314
003323
003368
003430

[3] A duplicate of Doc 3758.

		Holdings LLC, Stonehill Capital Management LLC
05/11/2023	3781	Order Fixing Briefing Scheduling and Hearing Date with Respect to HMIT's Emergency Motion for Leave to File Verified Adversary Proceeding as Supplemented
05/11/2023	3783	Highland and Seery's Joint Response to HMIT's Emergency Motion for Leave
05/11/2023	3784 (3784-1 — 3784-46)	Declaration of John Morris in Support of Highland Parties' Joint Response
05/18/2023	3785	HMIT's Reply in Support of Emergency Motion for Leave to File Adversary Proceeding
05/22/2023	3787	Order Pertaining to the Hearing on Hunter Mountain Investment Trust's Motion for Leave to File Adversary Proceeding [DE##3699 & 3760]
05/24/2023	3788 (3788-1 — 3788-5)	HMIT's Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of June 8, 2023 Hearing
05/24/2023	3789	HMIT's Application for Expedited Hearing
05/24/2023	3790	Order Pertaining to the Hearing on Hunter Mountain Investment Trust's Motion for Leave to File Adversary Proceeding [DE##3699 & 3760]
05/25/2023	3791 (3791-1 — 3791-5)	HMIT's Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of June 8, 2023 Hearing
05/25/2023	3792	Order Setting Expedited Hearing
05/25/2023	3795	Objection to Hunter Mountain Investment Trust's Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of June 8, 2023 Hearing filed by Farallon Capital Management, LLC, Jessup Holdings LLC, Muck Holdings LLC, Stonehill Capital Management LLC

Vol. 18

05/25/2023 004939.	3798 (3798-1)	Highland Parties' Joint Response in Opposition to HMIT's Emergency Motion for Expedited Discovery
05/26/2023 004959	3800	Order Regarding Hunter Mountain Investment Trust's Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of the June 8, 2023 Hearing
05/28/2023 004961	3801	Order Regarding Hunter Mountain Investment Trust's Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of the June 8, 2023 Hearing
06/05/2023 004984	3815 (3815-1)	Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding
06/05/2023 005049	3816 (3816-1)	Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding
06/05/2023 005114	3817 (3817-1 — 3817-5) Thru Vol. 25	Highland Parties' Witness and Exhibit List with Respect to Evidentiary Hearing on June 8, 2023
Vol. 26 06/05/2023 006608	3818 (3818-1 — 3818-9) Thru Vol. 39	HMIT's Witness and Exhibit List in Connection with its Emergency Motion for Leave to File Verified Adversary Proceeding, and Supplement
Vol. 39 06/07/2023 009273	3820	Highland Parties' Joint Motion to Exclude Testimony and Documents of Scott Van Meter and Steve Pully
06/07/2023 009290	3821 (3821-1 — 3821-3)	Declaration in Support of Highland Parties' Joint Motion to Exclude Testimony and Documents of Scott Van Meter and Steve Pully
06/07/2023 009416	3822 (3822-1)	HMIT's Unopposed Motion to File Exhibit Under Seal [WITHDRAWN]
06/07/2023 009424	3823	Joinder to Joint Motion to Exclude Testimony and Documents of Scott Van Meter and Steve Pully filed by Farallon Capital Management, LLC, Jessup Holdings LLC, Muck Holdings LLC, Stonehill Capital Management LLC

Vol. 40

06/07/2023	3824	HMIT's Objections to the Highland Parties' Exhibit and Witness List
06/08/2023	3828	HMIT's Response to Highland Claimant Trust and James P. Seery, Jr.'s Joint Motion to Exclude Testimony and Documents of Experts Scott Van Meter and Steve Pully
06/09/2023	3837	Request for transcript regarding hearing held on 06/08/2023
06/12/2023	3838	Court admitted exhibits on hearing June 8, 2023 (*See* Docket Entry Nos. 3817 & 3818)
06/12/2023	3841	Highland Parties' Reply in Further Support of their Joint Motion to Exclude Testimony and Documents of Scott Van Meter and Steve Pully
06/12/2023	3842 (3842-1)	Claim Purchasers' Joinder to Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery Jr.'s Reply in Further Support of Their Joint Motion to Exclude Testimony and Documents of Scott Van Meter and Steve Pully filed by Farallon Capital Management, LLC, Jessup Holdings LLC, Muck Holdings LLC, Stonehill Capital Management LLC
06/13/2023	3843	Transcript regarding Hearing Held 06/08/2023 Thru Vol. 41
06/13/2023	3844	Transcript regarding Hearing Held 05/26/2023
06/13/2023	3845	HMIT's Request for Oral Hearing or, Alternatively, a Schedule for Evidentiary Proffer
06/13/2023	3846	Response in Opposition to Hunter Mountain Investment Trust's Request for Oral Argument or, Alternatively, a Schedule for Evidentiary Proffer filed by Debtor Highland Capital Management, L.P., Other Professional Highland Claimant Trust, Creditor James P. Seery Jr.
06/13/2023	3847	HMIT's Reply to the Highland Parties' Response to Request for Oral Hearing
06/16/2023	3853	Memorandum Opinion and Order Granting Joint Motion to Exclude Expert Evidence

Vol. 42

06/16/2023 009928	3854	Memorandum Opinion and Order Granting Joint Motion to Exclude Expert Evidence
06/19/2023 009944	3858 (3858-1 — 3858-2)	Hunter Mountain Investment Trust's Evidentiary Proffer Pursuant to Rule 103(a)(2)[4]
06/23/2023 010013	3860	The Highland Parties' Objections to and Motion to Strike Hunter Mountain Investment Trust's Purported Proffer
06/23/2023 010023	3861	Claim Purchasers' Joinder to the Highland Parties' Objections and Motion to Strike Hunter Mountain Investment Trust's Purported Proffer
07/05/2023 010025	3869	Order Striking HMIT's Evidentiary Proffer Pursuant to Rule 103(a)(2) and Limiting Briefing
07/06/2023 010029	3872	Notice of Filing of the Current Balance Sheet of the Highland Claimant Trust filed by Debtor Highland Capital Management, L.P. and the Highland Claimant Trust
07/21/2023 010035	3888	Post-Confirmation Report for Highland Capital Management, LP for the Quarter Ending June 30, 2023 filed by Highland Capital Management, L.P.
07/21/2023 010047	3889	Post-Confirmation Report for Highland Capital Management, LP for the Quarter Ending June 30, 2023 filed by the Highland Claimant Trust
08/17/2023 010059	3901	Withdrawal of HMIT's Unopposed Motion to File Exhibit Under Seal filed by Creditor Hunter Mountain Investment Trust
Vol. 43 09/08/2023 010062	3905 (3905-1 — 3905-6)	Motion to Alter or Amend Order, to Amend or Make Additional Findings, for Relief from Order, or, Alternatively, for New Trial Under Federal Rules of Bankruptcy Procedure 7052, 9023, and 9024 and Incorporated Relief Filed by Creditor Hunter Mountain Investment Trust

[4] HMIT understands that the Court struck this proffer in docket entry 3869. Because the proffer appears to remain on the record and to avoid any argument that HMIT has failed its burden to designate the record, HMIT designates this docket entry out of an abundance of caution.

Vol. 43
010135
010136

09/11/2023	3907	Clerk's Correspondence regarding HMIT's Notice of Appeal
09/22/2023	3928	Notice Regarding Appeal and Pending Post-Judgment Motion filed by HMIT

B. Exhibits.

Further, the Parties submitted hearing exhibits. HMIT designates for inclusion in the record for appeal all the hearing exhibits submitted to the Court, which were all electronically filed and are in the Court's record and are a part of this Appellate Record. (Docs. 3817 and 3818). The following exhibits are submitted and included in the Court's record:

HMIT Exhibits (Dkts. 3818, 3818-1, 3818-2, 3818-3, 3818-4, 3818-5. 3818-6, 3818-7, 3818-8, and 3818-9)
HMIT Exhibits 1-4, 6-80
HCM Exhibits (Dkts. 3817, 3817-1, 3817-2, 3817-3, 3817-4, 3817-5)
HCM Exhibits 2-15, 25-34, 36, 38-42, 45-46, 51, 59-60, 100

Dated: October 23, 2023

Respectfully Submitted,

PARSONS MCENTIRE MCCLEARY PLLC

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Attorneys for Hunter Mountain Investment Trust

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served via ECF notification on October 23, 2023, on all parties receiving electronic notification.

/s/ Sawnie A. McEntire
Sawnie A. McEntire

failure to perform any of the foregoing obligations that first accrue from and after the date hereof.

5. Assignor agrees to indemnify and hold harmless Assignee from any cost, liability, damage or expense (including reasonable attorneys' fees) arising out of or relating to Assignor's failure to perform any of the obligations of Assignor under the Leases, to the extent accruing prior to the date hereof.

6. The property conveyed hereunder is conveyed by Assignor and accepted by Assignee **AS IS, WHERE IS, AND WITHOUT ANY WARRANTIES OF WHATSOEVER NATURE, EXPRESS OR IMPLIED, EXCEPT AS EXPRESSLY SET FORTH IN THE PURCHASE AGREEMENT, IT BEING THE INTENTION OF ASSIGNOR AND ASSIGNEE EXPRESSLY TO NEGATE AND EXCLUDE ALL WARRANTIES, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR ANY PARTICULAR PURPOSE, WARRANTIES CREATED BY ANY AFFIRMATION OF FACT OR PROMISE OR BY ANY DESCRIPTION OF THE PROPERTY CONVEYED HEREUNDER, OR BY ANY SAMPLE OR MODEL THEREOF, AND ALL OTHER WARRANTIES WHATSOEVER CONTAINED IN OR CREATED BY THE TEXAS UNIFORM COMMERCIAL CODE.**

7. This Bill of Sale, Assignment and Assumption may be executed in any number of counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

8. This Bill of Sale, Assignment and Assumption shall inure to the benefit of and be binding upon the heirs, personal representatives, successors, and assigns of each of the parties hereto.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK.]

EXECUTED as of _____, 202___.

ASSIGNOR:

MAPLE AVENUE HOLDINGS, LLC, a Texas limited liability company

By: Highland Capital Management, L.P., a Delaware limited partnership, its sole Member

By:_____
Name:_____
Title:_____

ASSIGNEE:

[_____**]**, a [_____]

By:
Name:
Title:

HMIT Exhibit No. 76

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	Chapter 11
ACIS CAPITAL MANAGEMENT, L.P., ET AL,	§	Case No. 18-30264-sgj11
Debtor.	§	

STATEMENT OF INTERESTED PARTY IN RESPONSE TO MOTION OF NEXPOINT STRATEGIC OPPORTUNITIES FUND TO CONFIRM DISCHARGE OR PLAN INJUNCTION DOES NOT BAR LAWSUIT, OR ALTERNATIVELY, FOR RELIEF FROM ALL APPLICABLE INJUNCTIONS

Highland Capital Management, L.P. ("HCMLP") respectfully submits this *Statement of Interested Party in Support of Objections to Motion of NexPoint Strategic Opportunities Fund to*

Confirm Discharge or Plan Injunction Does Not Bar Lawsuit, or Alternatively, for Relief from All Applicable Injunctions (the "Statement") and, in support thereof, states as follows:

STATEMENT

1. Highland CLO Funding, Ltd. ("HCLOF"),[1] holds 100% of the subordinated notes (*i.e.*, the equity) issued by the Acis CLOs,[2] except for 13% of the subordinated notes in Acis 2015-6 allegedly held by NexPoint Strategic Opportunities Fund ("NHF"). In turn, HCMLP and its wholly owned subsidiary, HCMLP Investments, LLC ("HCMLPI"),[3] own 50.62% of HCLOF's interests.[4] Accordingly, HCMLP has the greatest economic interest in the outcome of this dispute.

2. On April 28, 2021, HCLOF and Acis Capital Management, L.P. ("Acis"), among others, entered into a settlement agreement pursuant to which HCLOF released all of its claims against Acis and Joshua Terry, among others (the "Acis/HCLOF Settlement"),[5] that arose prior to the effective date of the Acis/HCLOF Settlement. In turn, Acis agreed to a consensual optional redemption of the Acis CLOs and distribution of the proceeds therefrom. Acis has successfully liquidated the vast majority of the Acis CLOs' collateral and paid off ***all*** the secured, senior notes issued by the Acis CLOs. The only obligations of the Acis CLOs still outstanding are the

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[1] HCLOF is managed by its Guernsey directors and advised by Highland HCF Advisors, Ltd. ("HHCFA"), its investment manager. HHCFA is a wholly owned subsidiary of HCMLP. HCLOF's current directors are two independent directors appointed on July 7, 2020, who have worked cooperatively with HHCFA and James P. Seery, Jr., HCMLP's Court-approved chief executive officer and chief restructuring officer, since their appointment. Both HCLOF and HHCFA support the filing of this Statement.

[2] "Acis CLOs" collectively refers to (i) Acis CLO 2014-3 Ltd. and Acis CLO 2014-3 LLC ("Acis 2014-3"); (ii) Acis CLO 2014-4 Ltd. and Acis CLO 2014-4 LLC ("Acis 2014-4"); (iii) Acis CLO 2014-5 Ltd. and Acis CLO 2014-5 LLC ("Acis 2014-5"); and (iv) Acis CLO 2015-6 Ltd. and Acis CLO 2015-6 LLC ("Acis 2015-6").

[3] HCMLPI obtained its HCLOF interests pursuant to HCMLP's settlement with the HarbourVest entities. *Order Approving Debtor's Settlement with HarbourVest (Claim Nos. 143, 147, 150, 153, 154) and Authorizing Actions Consistent Therewith, In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj11, D.I. 1788 (Bankr. N.D. Tex. Jan. 21, 2021).

[4] The balance of HCLOF's interests is held by CLO Holdco Ltd. ("CLOH"), a wholly owned subsidiary of Mr. Dondero's charitable trust, the Charitable DAF, L.P. HCMLP, HCMLPI, and CLOH have no right, as interest holders, to control HCLOF, and neither Mr. Dondero nor his related entities have any right to direct HCLOF.

[5] A true and correct copy of the Acis/HCLOF Settlement is attached hereto as **Exhibit A**. Although HCMLP and HCMLPI are not parties to the Acis/HCLOF Settlement, they support the settlement.

subordinated notes, which were subject to the HCLOF optional redemption. The Acis CLOs currently hold, in cash, approximately $33 million in liquidation proceeds which must be distributed to the subordinated noteholders and an additional $20 million in loans which, when sold, must also be distributed to the subordinated noteholders.

3. However, the litigation filed by NHF in the U.S. District for the Southern District of New York,[6] which is the predicate for the Motion,[7] as well as the threat of re-filing the DAF/Acis Complaint[8] (collectively, the "Litigation"), has caused Acis and U.S. Bank National Association (the "Trustee") to withhold the distributions due to the Acis CLOs' investors, including HCLOF (and ultimately HCMLP), as a purported reserve to pay potential indemnification claims.[9] The Acis CLOs' refusal to distribute the proceeds as required by the governing documents and the Acis/HCLOF Settlement adversely impacts HCLOF and HCMLP.[10]

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[6] *See Original Complaint, NexPoint Strategic Opportunities Fund v. Acis Capital Management, L.P., U.S. Bank, N.A., Joshua N. Terry, Brigade Capital Management, L.P.*, Case No. 1:21-cv-04384, D.I. 1 (S.D.N.Y. May 14, 2021) (the "NHF Complaint"). The NHF Complaint was filed by Sbaiti & Company PLLC.

[7] "Motion" refers to the *Motion of NexPoint Strategic Opportunities Fund to Confirm Discharge or Plan Injunction Does Not Bar Lawsuit, or Alternatively, for Relief from All Applicable Injunctions* [D.I. 1219].

[8] "DAF/Acis Complaint" refers to *Plaintiffs' Original Complaint and Jury Demand, The Charitable Donor Advised Fund, L.P. and CLO Holdco Ltd. v. U.S. Bank National Association, Moody's Investor Service, Inc., Acis Capital Management, L.P., and Brigade Capital Management LP, and Joshua N. Terry*, Case No. 20-CV-01036-LGS, D.I. 1 (S.D.N.Y. Feb. 6, 2020). The DAF/Acis Complaint was filed in February 2020 and subsequently withdrawn after HCMLP's independent directors intervened. It is not currently pending.

[9] HCLOF believes that the Acis CLOs have no authority to withhold the distributions under the Acis CLOs' governing documents and that such action may violate the Acis/HCLOF Settlement. Even assuming the Litigation has merit (and it does not), there is no justification for reserving nearly 100% of the current cash liquidation proceeds. The actions of Acis and the Trustee alleged by Mr. Dondero are egregious and would not be subject to indemnification if those allegations prove true. *See, e.g., Indenture*, dated April 16, 2015, by and between Acis CLO 2015-6 Ltd., as issuer, Acis CLO 2015-6 LLC, as co-issuer, and U.S. Bank National Association, as trustee (the "Acis 2015-6 Indenture"), § 6.1(a)(iii); Portfolio Management Agreement, dated as of April 16, 2015, between Acis CLO 2015-6 Ltd. and Acis Capital Management, L.P., § 11(a).

HCLOF reserves all rights that it may have at law and in equity, and nothing herein shall be considered a waiver of any such rights.

[10] As the largest subordinated noteholder, HCLOF would receive approximately $50 million (less costs) of the withheld proceeds (assuming all remaining collateral is sold and cash distributed). HCMLP, as the ultimate holder of 50.62% of HCLOF's interests, would receive approximately $25 million.

4. For the reasons discussed in the Objections,[11] HCMLP believes the Litigation is baseless and, in any event, barred by the Acis Plan Injunction,[12] including for the following additional reasons:

- NHF has no claim against Acis 2014-3. NHF's $5 million in Series F notes issued by Acis 2014-3 have been paid in full with interest.
- NHF's claim against Acis 2015-6 based on its alleged 13% "equity" interest is barred by the "no-action" clause contained in Acis 2015-6's indenture, which mandates that no less than 25% of the "Controlling Class" (*i.e.*, the subordinated notes) consent to bring suit.[13] HCLOF holds the balance of Acis 2015-6's subordinated notes and will not consent to the Litigation.
- With the exception of NHF's minimal and insufficient interest in Acis 2015-6, the only other party that could possibly assert the claims against Acis and the Trustee alleged in the Litigation, including the DAF/Acis Complaint, would be HCLOF. But, again, HCLOF has released those claims as set forth in the HCLOF/Acis Settlement, and no party, including Mr. Dondero and his related entities, can assert HCLOF's claims derivatively.
- The Acis Plan Injunction was approved to, among other things, allow Acis to manage the Acis CLOs free from frivolous litigation and general interference. At a minimum, the Litigation violates the intent and spirit of the Acis Plan Injunction because it is preventing Acis (and the Trustee) from complying with their obligations to the Acis CLOs by causing them to withhold distributions that are otherwise required to be made.

5. Ultimately, Mr. Dondero and his controlled entities are not pursuing the Litigation in order to vindicate their economic interests. Instead, the Litigation appears to be motivated by

[11] "Objections" means collectively (i) the *Objection of Reorganized Debtor Acis Capital Management, L.P. and Joshua N. Terry to Motion of NexPoint Strategic Opportunities Fund to Confirm Discharge or Plan Injunction Does Not Bar Lawsuit, or, Alternatively, for Relief from All Applicable Injunctions* [D.I. 1225]; and (ii) *Objection of U.S. Bank National Association, as CLO Trustee, to the Motion of NexPoint Strategic Opportunities Fund to Confirm Discharge or Plan Injunction Does Not Bar Lawsuit, or, Alternatively, for Relief from All Applicable Injunctions* [D.I. 1227].

[12] "Acis Plan Injunction" means those injunctions contained in Article 14.03 of that certain *Third Amended Joint Plan for Acis Capital Management, L.P., and Acis Capital Management GP, LLC*, as confirmed by the *Findings of Fact, Conclusions of Law, and Order Granting Final Approval of Disclosure Statement and Confirming the Third Amended Joint Plan for Acis Capital Management, L.P. and Acis Capital Management GP, LLC, as Modified, In re Acis Capital Management, L.P., et al*, Case No. 18-30264-SGJ11 (Bankr. N.D. Tex. Jan. 31, 2019).

[13] *See* Acis 2015-6 Indenture, § 5.8. The purpose of a "no-action" clause is to prevent superfluous suits against an issuer that are contrary to the interests of the bondholders as a whole – exactly the situation present here.

Mr. Dondero's desire to harass Acis and the Trustee while simultaneously interfering with distributions to be made pursuant to HCMLP's confirmed plan of reorganization. The Court should enforce the Acis Plan Injunction; shut down Mr. Dondero's attempts to evade this Court's jurisdiction; and put an end to the Litigation before it starts.[14]

[Remainder of Page Intentionally Blank]

[14] If this Court determines that additional evidence is required to rule on the Motion, the Court should, respectfully, reopen Acis's bankruptcy case.

WHEREFORE, HCMLP respectfully requests this Court (a) deny the Motion, and (b) grant such other relief as is just and proper, including the reopening of the Acis Bankruptcy.

Dated: August 18, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No.143717) (*pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084) (*pro hac vice*)
John A. Morris (NY Bar No. 266326) (*pro hac vice*)
Gregory V. Demo (NY Bar No. 5371992) (*pro hac vice*)
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hwinograd@pszjlaw.com

-and-

HAYWARD PLLC

/s/ Zachery Z. Annable

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Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for Highland Capital Management, L.P.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on August 18, 2021, a true and correct copy of the foregoing *Statement* was served via electronic mail upon those parties registered to receive electronic service via the Court's CM/ECF system.

/s/ Zachery Z. Annable
Zachery Z. Annable

EXHIBIT A

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into as of April 28, 2021 (the "Effective Date"), by and among (i) Highland CLO Funding, Ltd. ("HCLOF"), (ii) Acis Capital Management, L.P. ("Acis LP"), (iii) Acis Capital Management GP, LLC ("Acis GP," and with Acis LP, collectively, "Acis"); and (iv) Joshua Terry ("Terry," and with HCLOF and Acis, collectively, the "Parties").

WHEREAS, Acis GP and Acis LP are reorganized debtors in the chapter 11 bankruptcy cases *In re Acis Capital Management, L.P. and Acis Capital Management GP, LLC,* Case Nos. 18-30264 and 18-30265 (the "Bankruptcy Cases"), filed in the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court"); and

WHEREAS, section 14.03 of the Third Amended Plan of Reorganization filed in the Bankruptcy Cases on October 25, 2018 and confirmed by the Bankruptcy Court (the "Plan") provides for an injunction generally prohibiting the redemption or liquidation of certain Collateralized Loan Obligations or "CLOs" managed by Acis, defined in Plan section 1.01 (collectively, the "Acis CLOs") until, among terminating events, all allowed claims against the Debtors, as defined in the Plan, in the Bankruptcy Cases are paid in full (the "Injunction"); and

WHEREAS, the Parties agree that upon full payment of all allowed claims against the Debtors, as defined in the Plan, the Injunction shall automatically dissolve; and

WHEREAS, the Parties agree that in the absence of the Injunction, HCLOF may, among other things, direct Acis to redeem or liquidate some or all of the Acis CLOs as more specifically provided for in the CLO governing documents, including, without limitation, the PMAs, as the term PMAs is defined in section 1.88 of the Plan (collectively, the "PMAs"); and

WHEREAS, on July 26, 2019, HCLOF filed a notice of appeal from the judgment of the United States District Court for the Northern District of Texas affirming Bankruptcy Court's order confirming the Plan, which appeal is pending before the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") under Docket No. 19-10847 (the "Fifth Circuit Appeal"); and

WHEREAS, on June 20, 2019, Acis filed a second amended complaint in an adversary proceeding styled *Acis Capital Management, L.P. and Acis Capital Management GP, LLC v. Highland Capital Management, L.P., et al.,* Adv. Pro. No. 18-03078, in Bankruptcy Cases No. 18-30264 and 18-30265, in the United States Bankruptcy Court for the Northern District of Texas (the "First Lawsuit"); and

WHEREAS, on April 11, 2020, Acis filed an original complaint in an adversary proceeding styled *Acis Capital Management, L.P. and Acis Capital Management GP, LLC, Reorganized Debtors v. James Dondero et al.,* Adv. Pro. No. 20-03060, in Bankruptcy Cases No. 18-30264 and 18-30265, in the United States Bankruptcy Court for the Northern District of Texas (the "Second Lawsuit"); and

WHEREAS, the Parties desire to enter into this Agreement which, as set forth in more detail herein, provides for, among other things, the satisfaction of conditions necessary to lift the Injunction by its terms under the Plan, the optional redemption of certain Acis CLOs on terms directed by HCLOF and in accordance with the terms of the governing documents of the Acis CLOs (the "Redemption"), the dismissal with prejudice of the First Lawsuit; the dismissal of the Second Lawsuit with prejudice against defendants William Scott and Heather Bestwick (the "HCLOF Director Defendants"), the dismissal of the Fifth Circuit Appeal, and mutual full and complete releases of all claims and causes of action that the Parties have, or may have, against each other, as more fully set forth below.

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, the Parties agree as follows:

1. **Representations and Warranties Regarding Acis CLO Fees and Expenses.** Acis and Terry represent and warrant as follows: (a) Acis has provided certain confidential information, consisting of an analysis by a well-known international law firm with expertise in CLO documentation and the rights and remedies of parties who manage CLOs, and an analysis of well-known financial advisory firm, with regard to fees and expense submitted to and paid by the Acis CLOs (the "Confidential Professional Analyses"); (b) in the preparation of the Confidential Professional Analyses, Acis provided all requested information to the aforementioned law firm and the financial advisory firm in good faith, and all such information was accurate and complete to the best of Acis's and Terry's knowledge; and (c) Acis and Terry have no reason to believe that the conclusions contained in the Confidential Professional Analyses are incorrect.

2. **Representations and Warranties Regarding HCLOF's Ownership of Subordinated Notes of the Acis CLOs.** HCLOF represents and warrants it is currently, and has been since February 15, 2019, the owner of $39,750,000 subordinated notes issued by Acis CLO 2014-3 Ltd., $50,750,000 subordinated notes issued by Acis CLO 2014-4 Ltd., $53,000,000 subordinated notes issued by Acis CLO 2014-5 Ltd., and $51,850,000 subordinated notes issued by Acis CLO 2015-6 Ltd (the "HCLOF Subordinated Notes"). HCLOF further agrees that: (i) it will not sell, transfer or assign the HCLOF Subordinated Notes to any third party for a period of one hundred eighty (180) days following the Effective Date, (ii) any sale, transfer or assignment of the HCLOF Subordinated Notes to a third party following the expiration of this 180-day period shall provide that such third party transferee, assignee or successor (and any transferees, assignees or successors of an initial third party transferee, assignee or successor) shall be subject to, and bound by, the terms of this Agreement, and (iii) any third party transferees, assignees, or successors shall not be affiliated in any way with James Dondero, CLO Holdco, Ltd., The Charitable DAF Fund, L.P., or any other entities owned or controlled by James Dondero, including but not limited to any funds or entities managed by an affiliate of James Dondero.

3. **Stipulation, Representation and Warranty Regarding Payment of Claims against Acis.** As of the Effective Date, Acis and Terry stipulate, represent and warrant that all Allowed Claims against the Debtors, as that term is defined in section 1.48 of the Plan, have been paid in full and that the Injunction has expired by its terms under the Plan. Acis and Terry agree to provide notice and verification that the Injunction has expired by its terms to all parties required

to be notified, including the issuers and the indenture trustees for each of the Acis CLOs, so as to ensure that HCLOF may exercise all rights that have been restricted or impaired by the Injunction.

4. **Cooperation and Further Efforts to Extinguish Injunction.** Although the Parties agree that no order of the Bankruptcy Court or any other court is required for this Agreement and all its terms and provisions to be fully effective, Acis agrees to cooperate with HCLOF and take any further action reasonably requested by HCLOF to confirm the dissolution of the Injunction, including, without limitation, filing appropriate motions to reopen the Bankruptcy Cases and to obtain entry of an order of the Bankruptcy Court dissolving or confirming the dissolution of the Injunction.

5. **Redemption of the Acis CLOs.** In the event that Acis receives a notice of redemption or refinancing related to the Acis CLOs, Acis agrees to act in good faith and in accordance with its responsibilities and duties under the PMAs and consistent with the terms of the respective Acis CLO indentures. In exercising such duties, Acis shall discharge its duty of best execution consistent with the terms of the PMAs, and, if requested by HCLOF, shall provide HCLOF with the price and counterparty of any bids received on any Acis CLO collateral in the event of an optional redemption of any Acis CLO. Attached as Exhibit A to this Agreement are form redemption notices for each of the Acis CLOs which the Parties have approved as sufficient and acceptable in all respects to initiate the redemption of the Acis CLOs. Acis agrees that, provided it is not prohibited from doing so under the terms of the respective Acis CLO indentures, Acis will execute in good faith the redemptions of the Acis CLOs. Acis further agrees to accept and comply with HCLOF's reasonable requests for information related to daily reporting (if requested) on the execution of any trades or other activity to effectuate HCLOF's requested optional redemption of the Acis CLOs, and (if requested) act in good faith to facilitate direct communications between HCLOF and Acis's sub-adviser, Brigade Capital Management, LP related to the execution of any trades. The Parties further agree to cooperate in good faith to enjoin any third parties from interfering with any Redemption of the Acis CLOs (if requested), and shall not cooperate, encourage or voluntarily assist any third party from interfering with the Redemption of the Acis CLOs. Notwithstanding anything contained herein to the contrary, to the extent this agreement requires any action to be taken with respect to any matter and the PMAs or indentures of the Acis CLOs require(s) that a different action be taken with respect to such matter, the provisions of the PMAs and/or Acis CLO indenture in respect thereof shall control.

6. **Abstention From Further Portfolio Management.** Acis and Terry agree to refrain from acting or proposing to act as portfolio manager of HCLOF or any CLOs managed by Highland Capital Management, LP.

7. **Dismissal of the First and Second Lawsuits.** Acis agrees to file a motion to dismiss or a stipulation of dismissal of the First Lawsuit with prejudice within three (3) business days following the occurrence of both the Effective Date and Acis' receipt of an agreed proposed order or a signed stipulation of dismissal from HCLOF. Acis further agrees to file a motion to dismiss with prejudice the Second Lawsuit as against William Scott and Heather Bestwick within three (3) business days following the occurrence of both the Effective Date and Acis' receipt of an agreed proposed order of dismissal from William Scott and Heather Bestwick. Acis agrees to use its best efforts to obtain approval of any motions to dismiss filed pursuant to this paragraph and,

regardless of the disposition of any such motion, the Acis Releasors (as defined below) agree to be bound by the covenant not to sue or sue further, as set forth below, any of the Acis Releasees (as defined below) with respect to the First Lawsuit and the Second Lawsuit.

8. **Dismissal of the Fifth Circuit Appeal.** Within three (3) business days of the Effective Date, HCLOF and Acis shall jointly move to dismiss the Fifth Circuit Appeal with prejudice, with each party bearing its own costs of such dismissal. The Parties agree to act in good faith and to take all measures reasonably necessary to obtain Fifth Circuit approval of this request for dismissal.

9. **Acis Releases.** Effective upon the Effective Date, each of Acis GP, Acis LP, and Terry, for themselves and all their agents, representatives, officers, directors, advisors, employees, subsidiaries, successors and assigns in their capacities as such (collectively, "Acis Releasors"), with no further action required, forever agree and covenant not to sue or prosecute, or sue or prosecute further, against any Acis Releasee (as hereinafter defined) and shall forever waive, release and discharge, to the fullest extent permitted by law, each Acis Releasee from any and all claims (including, without limitation, crossclaims, counterclaims, rights of set-off and recoupment), actions, causes of action, suits, debts, accounts, interests, liens, promises, warranties, damages and consequential damages, demands, agreements, bonds, bills, specialties, covenants, controversies, variances, trespasses, judgments, executions, costs, expenses or claims whatsoever, that such Acis Releasor then has or thereafter may have, of whatsoever nature and kind, whether known or unknown, whether then existing or thereafter arising, whether arising at law or in equity, existing on or before the Effective Date (the "Acis Released Claims") against HCLOF in any capacity, HCLOF's respective successors and assigns, and each and all of the current and former officers, directors, employees, agents, attorneys, advisors and other representatives of each of the foregoing, including, without limitation, William Scott and Heather Bestwick (collectively, the "Acis Releasees"), provided, however, that Acis Released Claims do not include claims for the breach of this Agreement. In furtherance of the foregoing releases, and on and after the Effective Date, each of the Acis Releasors hereby irrevocably covenants and agrees to refrain from, directly or indirectly, asserting any claim, demand or remedy, or continuing, commencing, instituting, or causing to be commenced or instituted any proceeding, of any kind or nature whatsoever against any Acis Releasee based upon any Acis Released Claim. This release is intended to be a general release of all claims existing on or before the Effective Date. Notwithstanding anything contained herein to the contrary, the term Acis Releasees shall not include the Charitable Donor Advised Fund, LP (or any of its subsidiaries, including CLO Holdco, Ltd.), Grant Scott, James Dondero, David Simek, Dugaboy Investment Trust (or any trustee acting for that trust), or Mark Okada and his family trusts (and the trustees for such trusts in their representative capacities).

10. **HCLOF Releases.** Effective upon the Effective Date, HCLOF, for itself and all its agents, representatives, officers, directors, advisors, employees, subsidiaries, successors and assigns in their capacities as such (collectively, "HCLOF Releasors"), with no further action required, forever agrees and covenants not to sue or prosecute, or sue or prosecute further, against any HCLOF Releasee (as hereinafter defined) and shall forever waive, release and discharge, to the fullest extent permitted by law, each HCLOF Releasee from any and all claims (including, without limitation, crossclaims, counterclaims, rights of set-off and recoupment), actions, causes of action, suits, debts, accounts, interests, liens, promises, warranties, damages and consequential

damages, demands, agreements, bonds, bills, specialties, covenants, controversies, variances, trespasses, judgments, executions, costs, expenses or claims whatsoever, that such HCLOF Releasor then has or thereafter may have, of whatsoever nature and kind, whether known or unknown, whether then existing or thereafter arising, whether arising at law or in equity, existing on or before the Effective Date (the "HCLOF Released Claims") against Acis GP, Acis LP, and Terry, in any capacity, Brigade Capital Management, LP, U.S. Bank National Association, Moody's Investor Services, Inc., the Acis CLOs (with respect to any claims for breach of any duties or obligations owed by Acis to the Acis CLOs under the PMAs arising prior to the Effective Date, including but not limited to any fees and expenses paid by the Acis CLOs to Acis), each of their respective successors and assigns, and each and all of the officers, directors, employees, agents, attorneys, advisors and other representatives of each of the foregoing (collectively, the "HCLOF Releasees"), provided, however, that HCLOF Released Claims do not include claims for the breach of this Agreement. In furtherance of the foregoing releases, and on and after the Effective Date, HCLOF hereby irrevocably covenants and agrees to refrain from, directly or indirectly, asserting any claim, demand or remedy, or continuing, commencing, instituting, or causing to be commenced or instituted any proceeding, of any kind or nature whatsoever against any HCLOF Releasee based upon any HCLOF Released Claim. This release is intended to be a general release of all claims existing on or before the Effective Date.

11. **Additional Representations and Warranties**. In executing this Release, each of the Parties, on behalf of itself and each of its respective Releasors, hereby acknowledges, represents and warrants that it (i) has read and understands the terms in this Agreement, (ii) has consulted with and obtained the advice and counsel of its own attorney, (iii) has executed this Agreement and the releases therein without relying upon any statements, representations or warranties, written or oral, as to any law or fact made by any other Party, not expressly set forth herein, (iv) has executed this Agreement and the releases therein voluntarily and without any duress, coercion or undue influence of any kind, (v) is the sole owner of its Released Claims, and (vi) has not assigned, sold, or otherwise transferred its Released Claim to any other person or entity.

12. **Remedies.** In addition to all other remedies at law or equity available to any Party with respect to any breach of any provision of this Agreement, the Parties agree that a breach of the provisions of Sections 2 through 10 of this Agreement cannot be adequately remedied at law or by money damages, that resort to legal remedies alone would impose an undue hardship on the non-breaching Party, and would frustrate the intention of the parties in entering into this Agreement, and that the non-breaching Party is entitled to specific performance and injunctive relief, in addition to any otherwise appropriate legal remedy.

13. **Notices.** Notices or certifications within the scope of any PMAs or indenture of the Acis CLOs shall be served in the manner required by the respective PMA or indenture. All other requirements for notices or certifications under this Agreement, including notices for Requested Discovery or service of accounting, shall be satisfied if effected by electronic mail and overnight delivery as follows:

If to HCLOF:

To:

Richard Burwood, Director
Highland CLO Funding Ltd.
P.O. Box 650
1st Floor, Royal Chambers
St. Julians Ave
St. Peter Port, Guernsey, GY1 3JX

With a copy to:

Mark M. Maloney
King & Spalding LLP
1180 Peachtree Street, 35th Floor
Atlanta, Georgia 30309
mmaloney@kslaw.com

If to Acis:

To:
Joshua N. Terry
Acis Capital Management, LP
4514 Cole Ave. Suite 600
Dallas, TX 75205
josh@aciscm.com

With a copy to:

Jeff P. Prostok
Suzanne K. Rosen
Forshey Prostok, LLP
777 Main Street, Suite 1590
Fort Worth, TX 76102
jprostok@forsheyprostok.com
srosen@forsheyprostok.com

If to Terry:

Joshua Terry
4514 Cole Ave. Suite 600
Dallas, TX 75205
joshuanterry@gmail.com

With a copy to:

Jeff P. Prostok
Suzanne K. Rosen
Forshey Prostok, LLP
777 Main Street, Suite 1590
Fort Worth, TX 76102
jprostok@forsheyprostok.com
srosen@forsheyprostok.com

14. **Governing Law.** This Release shall be governed by the laws of the State of Texas. Any claim or action arising out of or relating to this Agreement shall be brought in the United States District Court for the Northern District of Texas.

15. **No Admission of Liability**. It is hereby understood and agreed that nothing herein, nor the acceptance or delivery of this Agreement by any Party shall be deemed or construed as an admission of liability of any nature whatsoever by any Party. This Agreement may be disclosed to the Bankruptcy Court or the Fifth Circuit by any Party for reasons other than to establish liability of any Party.

16. **Authority to Enter Into the Agreement.** Each Party hereby represents, warrants and agrees to the others that (i) it has the requisite power and authority to enter into and perform the terms of this Agreement on behalf of itself and each of its respective Releasors, (ii) no further authority or approval is necessary, and (iii) the person executing this Agreement on his, her or its behalf, if applicable, has the full right and authority to fully commit and bind such Party.

17. **Expenses.** Each Party shall bear its own expenses incurred in connection with the negotiation, execution and performance of this Agreement.

18. **Entire Agreement.** This Agreement sets forth the entire understanding of the Parties with respect to the subject matter hereof, and supersedes all prior letters of intent, agreements, covenants, arrangements, communications, representations or warranties, whether oral or written, made by any officer, director, manager, member or representative of any of the Parties.

19. **Counterparts.** This Agreement may be executed in multiple counterparts, each of which when taken together shall constitute one and the same instrument, and facsimile and PDF signatures shall be deemed originals.

[Signatures Appear On Next Page]

Executed and Agreed To:

Acis Capital Management, L.P.:
By: Shorewood GP, LLC, its general partner
Date: April 28, 2021

By: Joshua N. Terry
Its: President

Acis Capital Management GP, LLC:

Date: April 28, 2021

By: Joshua N. Terry
Its: President

Joshua Terry:

Date: April 28, 2021

Highland CLO Funding, Ltd.:

Date: April _____, 2021

By: _____
Its: _____

By: _____
Its: _____

Executed and Agreed To:

Acis Capital Management, L.P.:

Date: April _____, 2021

_____

By:_____
Its:_____

Acis Capital Management GP, LLC:

Date: April _____, 2021

_____

By:_____
Its:_____

Joshua Terry:

Date: April _____, 2021

_____

Highland CLO Funding, Ltd.:

Date: April 28th, 2021

_____

By: RICHARD BURWOOD
Its: DIRECTOR

_____

By: Richard Boleat
Its: Director

EXHIBIT A

[___ __], 2021

ACIS CLO 2014-3 Ltd.
c/o FFP (Corporate Services) Limited
2nd Floor, Harbour Centre
42 North Church Street
George Town, Grand Cayman
Cayman Islands
Facsimile: 1 345 941 5855

Re: Direction Letter – ACIS CLO 2014-3 Ltd.

Dear Sir or Madam:

Reference is hereby made to that certain Indenture, dated as of February 25, 2014 (as amended, modified or supplemented from time to time, the "Indenture"), among ACIS CLO 2014-3 Ltd. (the "Issuer"), ACIS CLO 2014-3 LLC (the "Co-Issuer") and U.S. Bank National Association (the "Trustee"). Capitalized terms used but not defined herein shall have the meanings set forth or incorporated by reference in the Indenture.

Pursuant to Sections 9.2 and 14.3 of the Indenture, the undersigned Holders of at least a Majority of the Aggregate Outstanding Amount of the Subordinated Notes have delivered a written notice dated [___ __], 2021 to the Issuer directing the Issuer to effect an Optional Redemption of all Secured Notes and Subordinated Notes in full on [___ __], 2021.

In connection therewith, the undersigned Holders hereby direct the Issuer to deliver an Issuer Order to the Trustee to deliver a notice of redemption to the Holders in the manner required by Section 9.4 of the Indenture in the name and at the expense of the Co-Issuers pursuant to Section 9.4(b) of the Indenture.

[Signature pages follow]

Very truly yours,

HIGHLAND CLO FUNDING, LTD. (f/k/a Acis Loan Funding, Ltd.)

By:_____
Name:
Title:

[___ __], 2021

ACIS CLO 2014-3 Ltd.
c/o MaplesFS Limited
P.O. Box 1093
Boundary Hall, Cricket Square
Grand Cayman, KY1-1102
Cayman Islands
Telephone: +1 (345) 945-7099
Facsimile: +1 (345) 945-7100

U.S. Bank National Association
190 South LaSalle Street, 8th Floor
Chicago, IL 60603
Attn: Global Corporate Trust – ACIS CLO 2014-3 Ltd.
Fax: 312-332-8030
E-mail: ACIS.CLO.2014.04@usbank.com

Acis Capital Management, L.P.
c/o Acis Capital Management GP, LLC
4514 Cole Avenue, Suite 600
Dallas, TX 75205
Attn: Joshua N. Terry, President
Email: Josh@aciscm.com

Re: ACIS CLO 2014-3 Ltd.

Dear Sir or Madam:

Reference is hereby made to that certain Indenture, dated as of February 25, 2014 (as amended, modified or supplemented from time to time, the "Indenture"), among ACIS CLO 2014-3 Ltd. (the "Issuer"), ACIS CLO 2014-3 LLC (the "Co-Issuer") and U.S. Bank National Association (the "Trustee"). Capitalized terms used but not defined herein shall have the meanings set forth or incorporated by reference in the Indenture.

Pursuant to Sections 9.2 and 14.3 of the Indenture, the undersigned Holders of at least a Majority of the Aggregate Outstanding Amount of the Subordinated Notes hereby direct the Issuer to effect an Optional Redemption of all Secured Notes and Subordinated Notes in full on [___ __], 2021.

[Signature pages follow]

Very truly yours,

HIGHLAND CLO FUNDING, LTD. (f/k/a Acis Loan Funding, Ltd.)

By:_____
Name:
Title:

By:_____
Name:
Title:

[____ __], 2021

ACIS CLO 2014-4 Ltd.
c/o FFP (Corporate Services) Limited
2nd Floor, Harbour Centre
42 North Church Street
George Town, Grand Cayman
Cayman Islands
Facsimile: 1 345 941 5855

Re: Direction Letter – ACIS CLO 2014-4 Ltd.

Dear Sir or Madam:

Reference is hereby made to that certain Indenture, dated as of June 5, 2014 (as amended, modified or supplemented from time to time, the "Indenture"), among ACIS CLO 2014-4 Ltd. (the "Issuer"), ACIS CLO 2014-4 LLC (the "Co-Issuer") and U.S. Bank National Association (the "Trustee"). Capitalized terms used but not defined herein shall have the meanings set forth or incorporated by reference in the Indenture.

Pursuant to Sections 9.2 and 14.3 of the Indenture, the undersigned Holders of at least 66 2/3% of the Aggregate Outstanding Amount of the Subordinated Notes have delivered a written notice dated [____ __], 2021 to the Issuer directing the Issuer to effect an Optional Redemption of all Secured Notes and Subordinated Notes in full on [____ __], 2021.

In connection therewith, the undersigned Holders hereby direct the Issuer to deliver an Issuer Order to the Trustee to deliver a notice of redemption to the Holders in the manner required by Section 9.3 of the Indenture in the name and at the expense of the Co-Issuers pursuant to Section 9.3(b) of the Indenture.

[Signature pages follow]

Very truly yours,

HIGHLAND CLO FUNDING, LTD. (f/k/a Acis Loan Funding, Ltd.)

By:_____
Name:
Title:

[___ __], 2021

ACIS CLO 2014-4 Ltd.
c/o FFP (Corporate Services) Limited
2nd Floor, Harbour Centre
42 North Church Street
George Town, Grand Cayman
Cayman Islands
Facsimile: 1 345 941 5855

U.S. Bank National Association
190 South LaSalle Street, 8th Floor
Chicago, IL 60603
Attn: Corporate Trust Services – ACIS CLO 2014-4
Fax: 312-332-8030
Email: ACIS.CLO.2014.04@usbank.com

Acis Capital Management, L.P.
c/o Acis Capital Management GP, LLC
4514 Cole Avenue, Suite 600
Dallas, TX 75205
Attn: Joshua N. Terry, President
Email: Josh@aciscm.com

Re: ACIS CLO 2014-4 Ltd.

Dear Sir or Madam:

Reference is hereby made to that certain Indenture, dated as of June 5, 2014 (as amended, modified or supplemented from time to time, the "Indenture"), among ACIS CLO 2014-4 Ltd. (the "Issuer"), ACIS CLO 2014-4 LLC (the "Co-Issuer") and U.S. Bank National Association (the "Trustee"). Capitalized terms used but not defined herein shall have the meanings set forth or incorporated by reference in the Indenture.

Pursuant to Sections 9.2 and 14.3 of the Indenture, the undersigned Holders of at least 66 2/3% of the Aggregate Outstanding Amount of the Subordinated Notes hereby direct the Issuer to effect an Optional Redemption of all Secured Notes and Subordinated Notes in full on [___ __], 2021.

[Signature pages follow]

Very truly yours,

HIGHLAND CLO FUNDING, LTD. (f/k/a Acis Loan Funding, Ltd.)

By:_____
Name:
Title:

By:_____
Name:
Title:

[___ __], 2021

ACIS CLO 2014-5 Ltd.
c/o FFP (Corporate Services) Limited
2nd Floor, Harbour Centre
42 North Church Street
George Town, Grand Cayman
Cayman Islands
Facsimile: 1 345 941 5855

Re: Direction Letter – ACIS CLO 2014-5 Ltd.

Dear Sir or Madam:

Reference is hereby made to that certain Indenture, dated as of November 18, 2014 (as amended, modified or supplemented from time to time, the "Indenture"), among ACIS CLO 2014-5 Ltd. (the "Issuer"), ACIS CLO 2014-5 LLC (the "Co-Issuer") and U.S. Bank National Association (the "Trustee"). Capitalized terms used but not defined herein shall have the meanings set forth or incorporated by reference in the Indenture.

Pursuant to Sections 9.2 and 14.3 of the Indenture, the undersigned Holders of at least 66 2/3% of the Aggregate Outstanding Amount of the Subordinated Notes have delivered a written notice dated [___ __], 2021 to the Issuer directing the Issuer to effect an Optional Redemption of all Secured Notes and Subordinated Notes in full on [___ __], 2021.

In connection therewith, the undersigned Holders hereby direct the Issuer to deliver an Issuer Order to the Trustee to deliver a notice of redemption to the Holders in the manner required by Section 9.3 of the Indenture in the name and at the expense of the Co-Issuers pursuant to Section 9.3(b) of the Indenture.

[Signature pages follow]

Very truly yours,

HIGHLAND CLO FUNDING, LTD. (f/k/a Acis Loan Funding, Ltd.)

By:_____
Name:
Title:

[___ __], 2021

ACIS CLO 2014-5 Ltd.
c/o FFP (Corporate Services) Limited
2nd Floor, Harbour Centre
42 North Church Street
George Town, Grand Cayman
Cayman Islands
Facsimile: 1 345 941 5855

U.S. Bank National Association
190 South LaSalle Street, 8th Floor
Chicago, IL 60603
Attn: Corporate Trust Services – ACIS CLO 2014-5
Fax: 312-332-8030
Email: ACIS.CLO.2014.05@usbank.com

Acis Capital Management, L.P.
c/o Acis Capital Management GP, LLC
4514 Cole Avenue, Suite 600
Dallas, TX 75205
Attn: Joshua N. Terry, President
Email: Josh@aciscm.com

Re: ACIS CLO 2014-5 Ltd.

Dear Sir or Madam:

Reference is hereby made to that certain Indenture, dated as of November 18, 2014 (as amended, modified or supplemented from time to time, the "Indenture"), among ACIS CLO 2014-5 Ltd. (the "Issuer"), ACIS CLO 2014-5 LLC (the "Co-Issuer") and U.S. Bank National Association (the "Trustee"). Capitalized terms used but not defined herein shall have the meanings set forth or incorporated by reference in the Indenture.

Pursuant to Sections 9.2 and 14.3 of the Indenture, the undersigned Holders of at least 66 2/3% of the Aggregate Outstanding Amount of the Subordinated Notes hereby direct the Issuer to effect an Optional Redemption of all Secured Notes and Subordinated Notes in full on [___ __], 2021.

[Signature pages follow]

Very truly yours,

HIGHLAND CLO FUNDING, LTD. (f/k/a Acis Loan Funding, Ltd.)

By:_____
Name:
Title:

By:_____
Name:
Title:

[___ __], 2021

ACIS CLO 2015-6 Ltd.
c/o FFP (Corporate Services) Limited
2nd Floor, Harbour Centre
42 North Church Street
George Town, Grand Cayman
Cayman Islands
Facsimile: 1 345 941 5855

Re: Direction Letter – ACIS CLO 2015-6 Ltd.

Dear Sir or Madam:

Reference is hereby made to that certain Indenture, dated as of April 16, 2015 (as amended, modified or supplemented from time to time, the "Indenture"), among ACIS CLO 2015-6 Ltd. (the "Issuer"), ACIS CLO 2015-6 LLC (the "Co-Issuer") and U.S. Bank National Association (the "Trustee"). Capitalized terms used but not defined herein shall have the meanings set forth or incorporated by reference in the Indenture.

Pursuant to Sections 9.2 and 14.3 of the Indenture, the undersigned Holders of at least 66 2/3% of the Aggregate Outstanding Amount of the Subordinated Notes have delivered a written notice dated [___ __], 2021 to the Issuer directing the Issuer to effect an Optional Redemption of all Secured Notes and Subordinated Notes in full on [___ __], 2021.

In connection therewith, the undersigned Holders hereby direct the Issuer to deliver an Issuer Order to the Trustee to deliver a notice of redemption to the Holders in the manner required by Section 9.3 of the Indenture in the name and at the expense of the Co-Issuers pursuant to Section 9.3(b) of the Indenture.

[Signature pages follow]

Very truly yours,

HIGHLAND CLO FUNDING, LTD. (f/k/a Acis Loan Funding, Ltd.)

By:_____
Name:
Title:

[___ __], 2021

ACIS CLO 2015-6 Ltd.
c/o FFP (Corporate Services) Limited
2nd Floor, Harbour Centre
42 North Church Street
George Town, Grand Cayman
Cayman Islands
Facsimile: 1 345 941 5855

U.S. Bank National Association
190 South LaSalle Street, 8th Floor
Chicago, IL 60603
Attn: Corporate Trust Services – ACIS CLO 2015-6
Fax: 312-332-8030
Email: ACIS.CLO.2015.06@usbank.com

Acis Capital Management, L.P.
c/o Acis Capital Management GP, LLC
4514 Cole Avenue, Suite 600
Dallas, TX 75205
Attn: Joshua N. Terry, President
Email: Josh@aciscm.com

Re: ACIS CLO 2015-6 Ltd.

Dear Sir or Madam:

Reference is hereby made to that certain Indenture, dated as of April 16, 2015 (as amended, modified or supplemented from time to time, the "Indenture"), among ACIS CLO 2015-6 Ltd. (the "Issuer"), ACIS CLO 2015-6 LLC (the "Co-Issuer") and U.S. Bank National Association (the "Trustee"). Capitalized terms used but not defined herein shall have the meanings set forth or incorporated by reference in the Indenture.

Pursuant to Sections 9.2 and 14.3 of the Indenture, the undersigned Holders of at least 66 2/3% of the Aggregate Outstanding Amount of the Subordinated Notes hereby direct the Issuer to effect an Optional Redemption of all Secured Notes and Subordinated Notes in full on [___ __], 2021.

[Signature pages follow]

Very truly yours,

HIGHLAND CLO FUNDING, LTD. (f/k/a Acis Loan Funding, Ltd.)

By:_____
Name:
Title:

By:_____
Name:
Title:

HMIT Exhibit No. 77

UNITED STATES BANKRUPTCY COURT

Northern DISTRICT OF Texas

Case number 19-34054 sgj11

In re: Highland Capital Management, LP

Debtor(s)

Case No. 19-34054

☐ Jointly Administered

Post-confirmation Report

Chapter 11

Quarter Ending Date: 03/31/2023

Petition Date: 10/16/2019

Plan Confirmed Date: 02/22/2021

Plan Effective Date: 08/11/2021

This Post-confirmation Report relates to:

◉ Reorganized Debtor

○ Other Authorized Party or Entity: _____

Name of Authorized Party or Entity

/s/ Zachery Z. Annable

Signature of Responsible Party

04/21/2023

Date

Zachery Z. Annable, Hayward PLLC

Printed Name of Responsible Party

10501 N. Central Expressway, Suite 106
Dallas TX 75231

Address

STATEMENT: This Periodic Report is associated with an open bankruptcy case; therefore, Paperwork Reduction Act exemption 5 C.F.R. § 1320.4(a)(2) applies.

Debtor's Name Highland Capital Management, LP Case No. 19-34054

Part 1: Summary of Post-confirmation Transfers

	Current Quarter	Total Since Effective Date
a. Total cash disbursements	$15,817,995	$115,423,961
b. Non-cash securities transferred	$0	$0
c. Other non-cash property transferred	$573,888	$5,194,652
d. Total transferred (a+b+c)	$16,391,883	$120,618,613

Part 2: Preconfirmation Professional Fees and Expenses

				Approved Current Quarter	Approved Cumulative	Paid Current Quarter	Paid Cumulative
a.	Professional fees & expenses (bankruptcy) incurred by or on behalf of the debtor		*Aggregate Total*	$0	$33,005,136	$0	$33,005,136
	Itemized Breakdown by Firm						
		Firm Name	Role				
	i	Pachulski Stang Ziehl & Jones	Lead Counsel	$0	$24,312,860	$0	$24,312,860
	ii	Development Specialists, Inc.	Financial Professional	$0	$5,765,448	$0	$5,765,448
	iii	Kurtzman Carson Consultants	Other	$0	$2,054,716	$0	$2,054,716
	iv	Hayward & Associates PLLC	Local Counsel	$0	$872,112	$0	$872,112
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				Approved Current Quarter	Approved Cumulative	Paid Current Quarter	Paid Cumulative
b.	Professional fees & expenses (nonbankruptcy) incurred by or on behalf of the debtor *Aggregate Total*			$0	$7,604,472	$0	$7,604,472
	Itemized Breakdown by Firm						
		Firm Name	Role				
	i	Hunton Andrews Kurth LLP	Other	$0	$1,149,807	$0	$1,149,807
	ii	Foley Gardere, Foley & Lardne	Other	$0	$629,088	$0	$629,088
	iii	Deloitte	Financial Professional	$0	$553,413	$0	$553,413
	iv	Mercer (US) Inc.	Other	$0	$204,767	$0	$204,767
	v	Teneo Capital, LLC	Financial Professional	$0	$1,364,823	$0	$1,364,823
	vi	Wilmer Cutler Pickering Hale	Other	$0	$2,650,937	$0	$2,650,937

Debtor's Name Highland Capital Management, LP Case No. 19-34054

	vii	Carey Olsen	Other	$0	$280,264	$0	$280,264
	viii	ASW Law	Other	$0	$4,976	$0	$4,976
	ix	Houlihan Lokey Financial Advi	Other	$0	$766,397	$0	$766,397
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Debtor's Name Highland Capital Management, LP Case No. 19-34054

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c.	All professional fees and expenses (debtor & committees)			$0	$60,171,929	$0	$60,171,929

Part 3: Recoveries of the Holders of Claims and Interests under Confirmed Plan

	Total Anticipated Payments Under Plan	Paid Current Quarter	Paid Cumulative	Allowed Claims	% Paid of Allowed Claims
a. Administrative claims	$0	$0	$15,750	$15,750	100%
b. Secured claims	$5,843,261	$0	$5,274,477	$5,274,477	100%
c. Priority claims	$16,498	$0	$1,213,832	$1,213,832	100%
d. General unsecured claims	$205,144,544	$15,044,364	$270,205,592	$397,485,568	68%
e. Equity interests	$0	$0	$0		

Part 4: Questionnaire

a. Is this a final report? Yes ○ No ●

If yes, give date Final Decree was entered: ____________

If no, give date when the application for Final Decree is anticipated: ____________

b. Are you current with quarterly U.S. Trustee fees as set forth under 28 U.S.C. § 1930? Yes ● No ○

Privacy Act Statement

28 U.S.C. § 589b authorizes the collection of this information and provision of this information is mandatory. The United States Trustee will use this information to calculate statutory fee assessments under 28 U.S.C. § 1930(a)(6) and to otherwise evaluate whether a reorganized chapter 11 debtor is performing as anticipated under a confirmed plan. Disclosure of this information may be to a bankruptcy trustee when the information is needed to perform the trustee's duties, or to the appropriate federal, state, local, regulatory, tribal, or foreign law enforcement agency when the information indicates a violation or potential violation of law. Other disclosures may be made for routine purposes. For a discussion of the types of routine disclosures that may be made, you may consult the Executive Office for United States Trustee's systems of records notice, UST-001, "Bankruptcy Case Files and Associated Records." *See* 71 Fed. Reg. 59,818 et seq. (Oct. 11, 2006). A copy of the notice may be obtained at the following link: http://www.justice.gov/ust/eo/rules_regulations/index.htm. Failure to provide this information could result in the dismissal or conversion of your bankruptcy case, or other action by the United States Trustee. 11 U.S.C. § 1112(b)(4)(F).

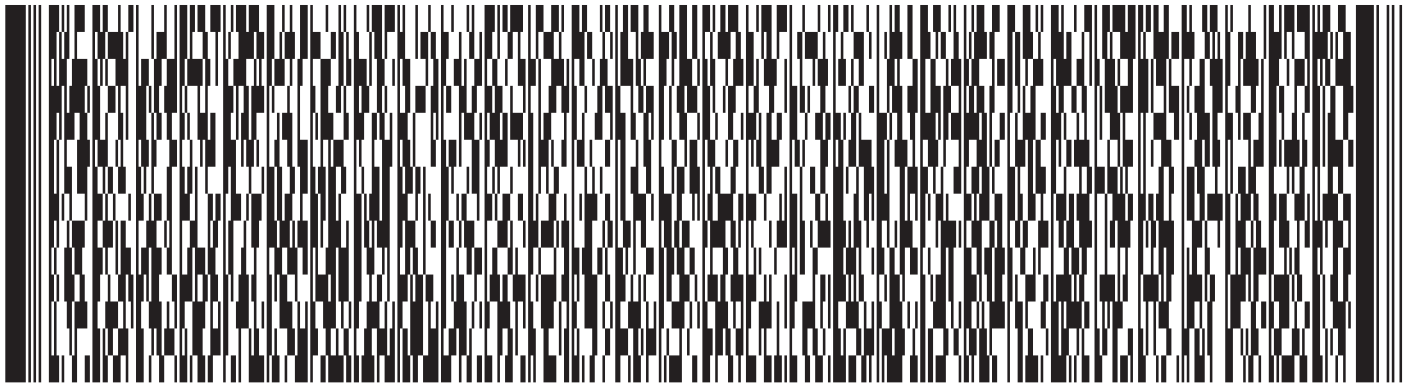
I declare under penalty of perjury that the foregoing Post-confirmation Report and its attachments, if any, are true and correct and that I have been authorized to sign this report.

/s/ James Seery
Signature of Responsible Party

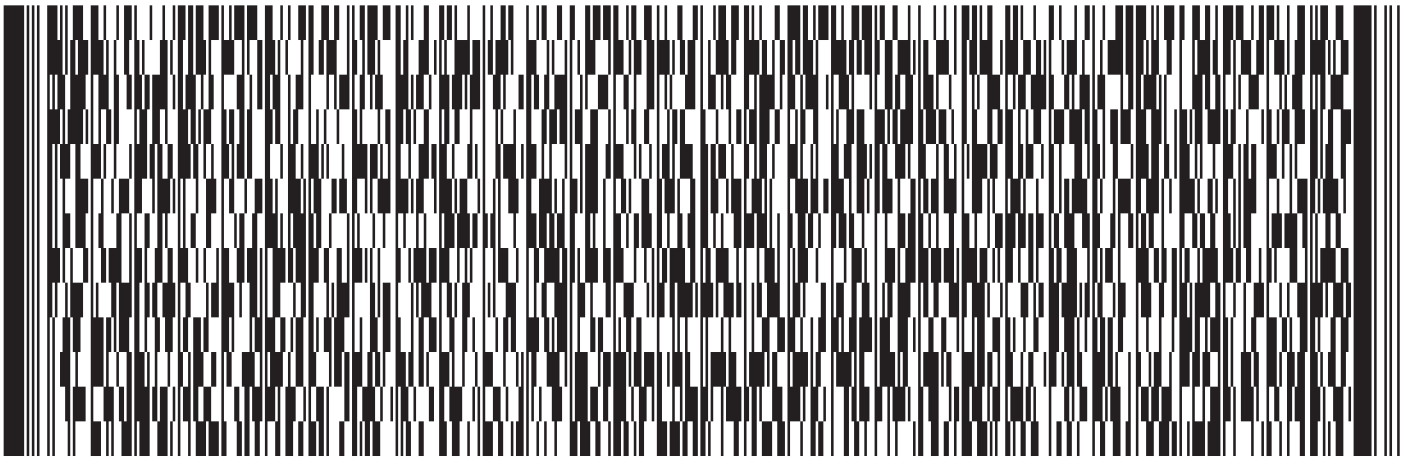
James Seery
Printed Name of Responsible Party

CEO
Title

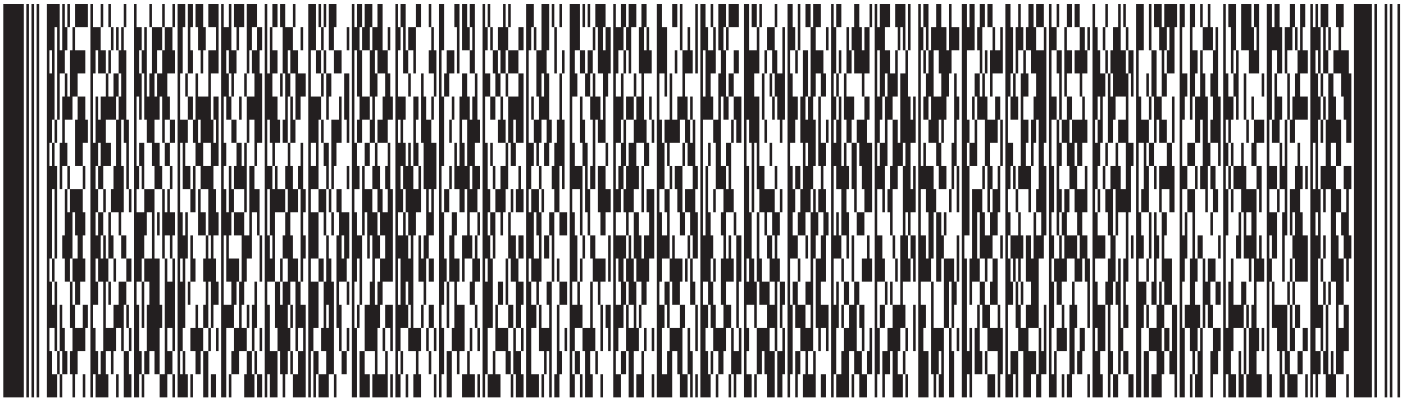
04/21/2023
Date



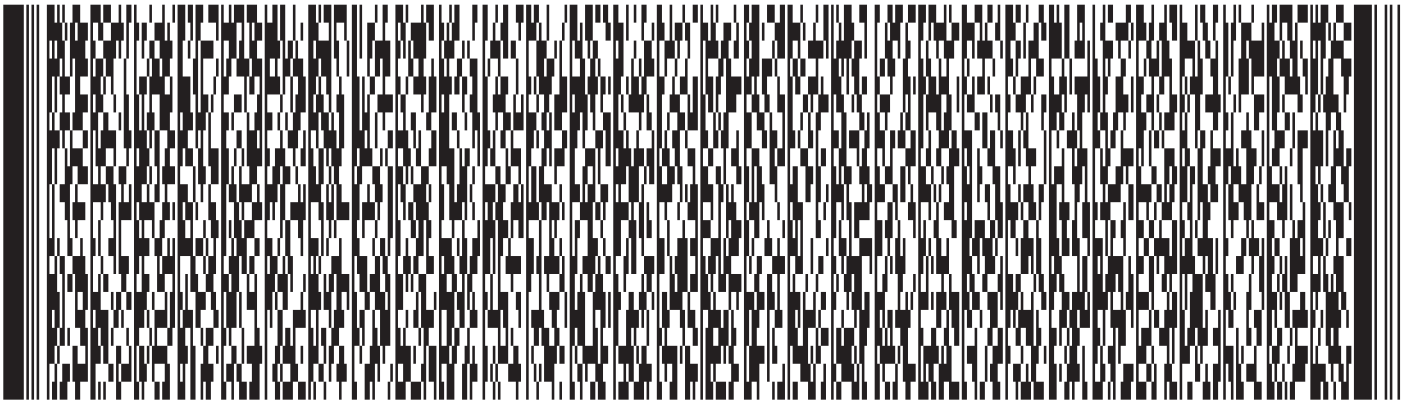
Page 1



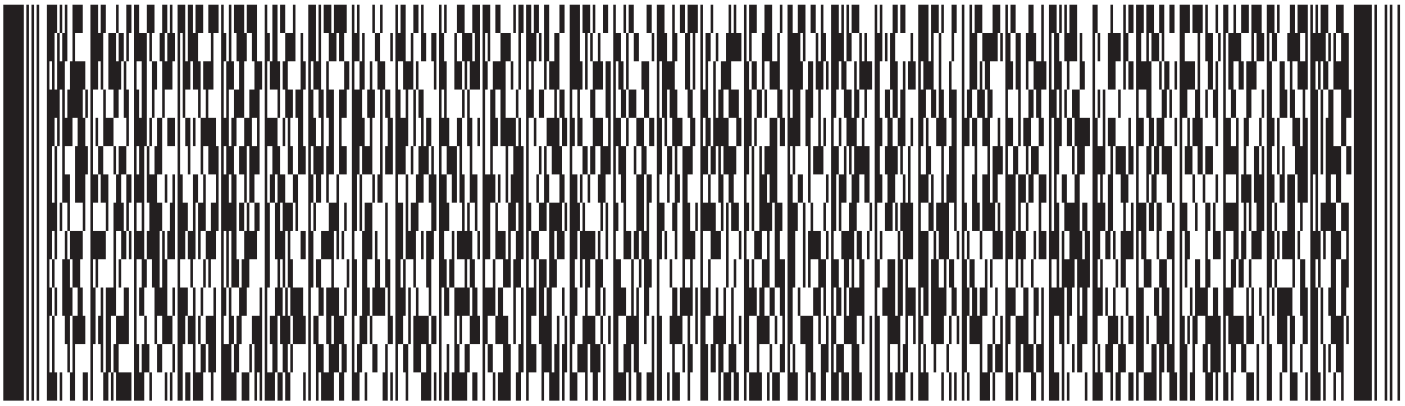
Other Page 1



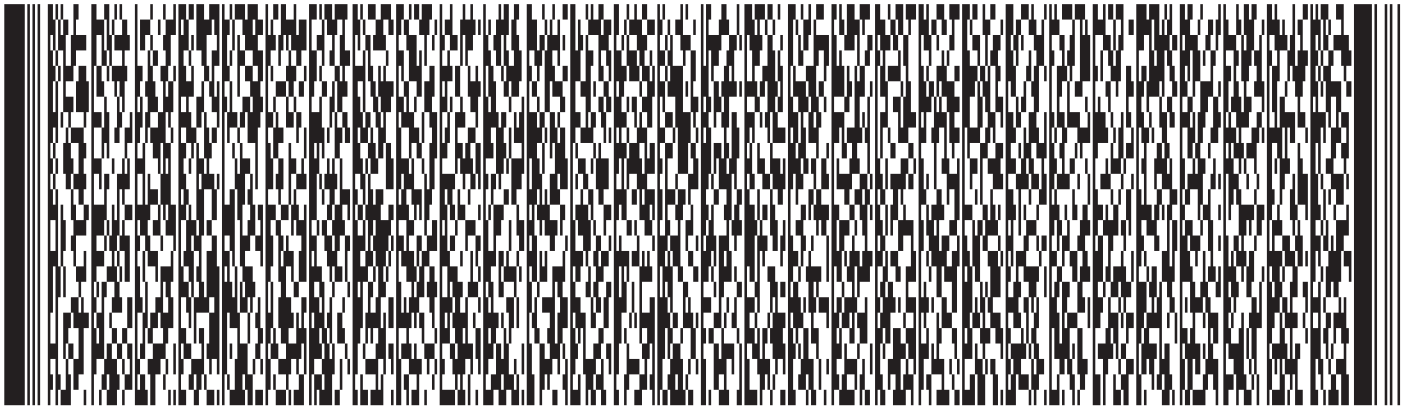
Page 2 Minus Tables



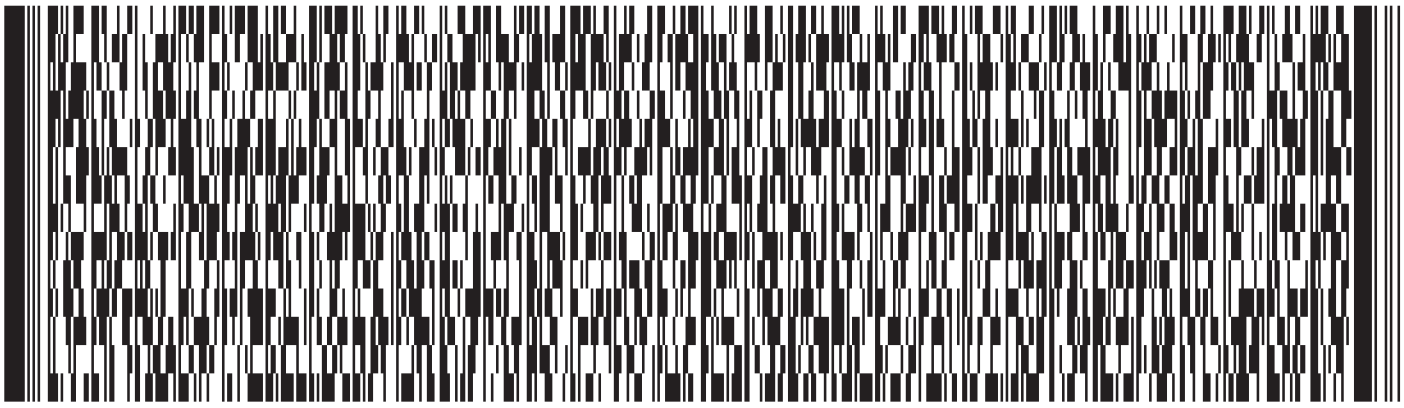
Bankruptcy Table 1-50



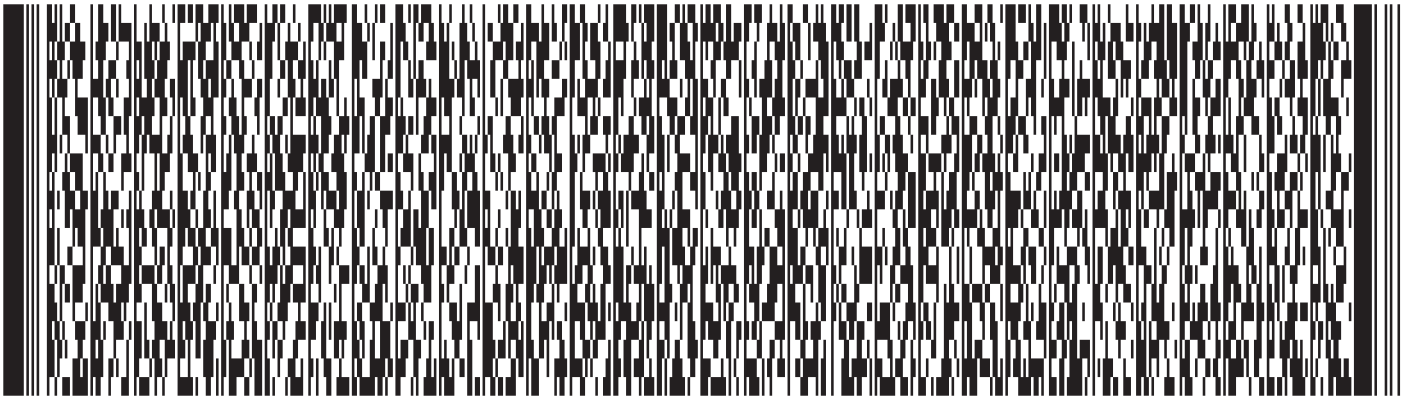
Bankruptcy Table 51-100



Non-Bankruptcy Table 1-50



Non-Bankruptcy Table 51-100



Part 3, Part 4, Last Page

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	)	Case No. 19-34054-sgj11
Reorganized Debtor.	)	

GLOBAL NOTES TO POST CONFIRMATION REPORT

The Reorganized Debtor has filed the attached post-confirmation report (the "PCR") in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court"), on behalf of debtor Highland Capital Management, L.P., Case No. 19-34054 (SGJ) (the "Bankruptcy Case"). The Reorganized Debtor prepared the PCR with the assistance of the Reorganized Debtor's employees, advisors, and professionals. The PCR was prepared solely for the purpose of complying with the post-confirmation quarterly reporting requirements established by the United States Trustee Program (*see* https://www.justice.gov/ust/chapter-11-operating-reports). The PCR should not be relied upon by any persons for any information in connection with current or future financial conditions or events relating to the Reorganized Debtor or its estate.

The financial information contained in the PCR is preliminary, unaudited, limited in scope, and is not prepared in accordance with accounting principles generally accepted in the United States of America nor in accordance with other applicable non-bankruptcy law. In preparing the PCR, the Reorganized Debtor relied on financial data from the books and records available to it at the time of such preparation, as well as certain filings on the docket in the Bankruptcy Case. Although the Reorganized Debtor made commercially reasonable efforts to ensure the accuracy and completeness of the PCR, inadvertent errors or omissions may exist. The Reorganized Debtor reserves the right to amend and supplement the PCR as may be necessary or appropriate.

Part 2: Preconfirmation Professional Fees and Expenses

In Section A of the PCR, the Reorganized Debtor listed the bankruptcy related professionals employed in connection with the Bankruptcy Case.

In Section B of the PCR, the Reorganized Debtor listed non-bankruptcy professionals, those that would have been retained absent the Bankruptcy Case, and the ordinary course professionals ("OCP"). Hunton Andrews Kurth LLP ("Hunton") and Wilmer Cutler Pickering Hale and Dorr

[1] The Reorganized Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

LLP ("Wilmer Hale") were originally ordinary course professionals but were later employed professionals. The amounts listed for Hunton and Wilmer Hale include the OCP payments and employed professional payments.

In Section C of the PCR, the Reorganized Debtor totals all payments included in Sections A and B, along with payments made to professional employed by the official committee of unsecured creditors (the "Committee").

The approved current quarter, approved cumulative, and paid cumulative will have the same amount listed due to approval and payment of final fee applications.

Part 3: Recoveries of the Holders of Claims and Interests under Confirmed Plan

The payments made to holders of General Unsecured Claims were disbursed from the Claimant Trust, but for presentation purposes, have been included in Part 3 of the post-confirmation report for the Reorganized Debtor.

The presentation contained in this PCR does not reflect the material and necessary reserves that will be taken in accordance with Reorganized Debtor's governing documents and the Plan.

The Debtor reserves all right to object to any claim in accordance with the terms of the Plan.

Addendum to Global Notes for March 31, 2023 Quarterly Operating Report
Summary of Highland Claimant Trust ("Claimant Trust") & Highland Capital Management, L.P. ("HCMLP"), Effectuation of Plan as of March 31, 2023

Item 1: Quarter-ending cash, Disputed Claims Reserve, and Indemnity Trust summary (in $ millions)

Quarter End Date	Quarter End Cash and Equivalents balances [1][2]	Cumulative Funding – Disputed Claims Reserve	Cumulative Funding – Indemnity Trust [2]
3/31/2021	$27.9	n/a	n/a
6/30/2021	$17.9	n/a	n/a
9/30/2021	$33.6	n/a	$2.5
12/31/2021	$19.8	n/a	$2.5
3/31/2022	$21.1	n/a	$2.5
6/30/2022	$85.2	n/a	$2.5
9/30/2022	$31.8	$11.0	$20.0
12/31/2022	$36.6	$11.0	$20.0
3/31/2023	$25.0	$11.6	$32.0

[1] Bank cash for Claimant Trust, HCMLP (debtor up to August 11, 2021; re-organized from August 11, 2021), Highland Litigation Trust Sub-Trust ("Litigation Trust"), HCMLP GP LLC and including cash at brokerage account(s), cash equivalents as well as cash or equivalent reserves for earned operating obligations, if applicable. All amounts herein EXCLUDE the Highland Indemnity Trust ("Indemnity Trust") and the cash held within the Disputed Claims Reserve, which are described separately, as well as any other segregated agency or shareholder representative account(s) for which cash is held solely for the benefit of others.

[2] Based upon the baseless filed motion seeking to litigate against indemnified parties and threats from vexatious parties, the Claimant Trustee expects to fund significant additional amounts into the Indemnity Trust.

Item 2: Class 8 / Class 9 Summary (in $ millions)

Note that payments described within Part 3 of the quarterly operating report include payments to classes 6, 7, 8, and 9, whereas payments below only include payments to classes 8 and 9, as applicable.

Class 8 / 9 Summary (in $ millions)	Cash Payments through March 31, 2023	Disputed Claims Reserve	Remaining [3]
Class 8	$263.4	$11.6	$28.7
Class 9	$0.0	$0.0	$98.8
Classes 8 + 9	$263.4	$11.6	$127.4

[3] Face amount of allowed class 8/9 claims PLUS face amount of pending class 8/9 claims LESS cumulative payments to classes 8/9 LESS cumulative reserves for classes 8/9. Amounts EXCLUDE accrued interest on claim balances as well as amounts of pending admin priority claims, and unliquidated pending class 8/9 claims. Any future distributions to classes 8 and 9 are subject to satisfaction of Claimant Trust senior obligations.

Item 3: Remaining disputed/expunged or pending claims (in $ millions)

Amounts reserved within the Disputed Claims Reserve are in no way indicative of the value or validity of the claim, but rather are simply established based on the face amount of the claim and the proportionate calculation of amounts already distributed to actual allowed claimholders.

Party	Claim number(s)	Face amount	Reserved in Disputed Claims Reserve	Unreserved
Highland CLO Management, Ltd.	Scheduled/Disputed	$10.1	($9.2)	$1.0
Patrick Daugherty [4]	205	$2.7	($2.4)	$0.3
CLO Holdco, Ltd. [5]	254	Unliquidated	$0.0	See note
HCRE Partners, LLC [6]	146	Unliquidated	$0.0	See note
Hunter Covitz [7]	186	Unliquidated	$0.0	See note
Highland Capital Management Fund Advisors, LP and NexPoint Advisors, LP [8]	239	$6.7	$0.0	$6.7
Total		$19.5	($11.6)	$7.9

[4] Proof of claim has been partially settled, with the exception of the Reserved Claim as described in the settlement agreement with Mr. Daugherty [Docket No. 3298]. Claimant may assert additional amounts may be owed.

[5] CLO Holdco, Ltd., initially filed proof of claim 133 and subsequently amended that claim to $0.00 in open court and then by filing proof of claim 198. HCMLP relied on that agreement and amendment. Subsequently, CLO Holdco, Ltd., sought to amend claim 198 to an estimated amount of $3.8 million by filing proof of claim 254. The Litigation Trust objected to the attempted amended claim, and CLO Holdco, Ltd.'s claim was adjudicated at $0.00. CLO HoldCo, Ltd., has appealed.

[6] HCRE Partners, LLC filed a motion to withdraw proof of claim 146. HCMLP contested that the withdrawal of the claim. The matter is sub judice.

[7] Proof of claim 186 was expunged, but alleged transferee of expunged claim has appealed; appeal pending.

[8] Proof of claim 239, which is an administrative priority claim, was expunged and judgment was granted against alleged creditor, but alleged creditor has appealed.

Item 4: Interest-bearing debt outstanding as of March 31, 2023 (in $ millions)

No interest-bearing debt outstanding. Exit Facility retired in 2022. [9]

[9] Encompasses Claimant Trust, HCMLP (re-organized), Litigation Trust, HCMLP GP LLC, but does not look-through to their respective subsidiaries and/or private funds or companies held by private funds.

Item 5: Remaining investments, notes, and other assets [10]

Asset (alphabetic sorting, except "Other misc.")	Description
Breach of contract judgment	Direct asset. Bonded judgment against Highland Capital Management Fund Advisors, LP and NexPoint Advisors, LP, pending appeal.
Contempt civil penalty	Direct asset. Civil penalty owed by Mr. Dondero from the first of two contempt orders against him (his second contempt civil penalty was already received from subsidiary of DAF).
Contingent rights, post-sale	Residual contingent rights tied to milestones from a company that was sold Pre-Petition – direct and indirect interests through managed fund(s).
Highland CLO Funding, Ltd. ("HCLOF")	Majority-owned by HCMLP or Claimant Trust (directly or indirectly) but controlled by two independent Guernsey-based directors – investments of this entity are predominantly subordinated notes of Acis-managed CLOs, whose remaining value is predominantly cash. Remaining distributions are held up due to litigation against Acis-related entities and HCLOF by Mr. Dondero's entities.
NHT.U (TSXV exchange)	Direct asset. Hospitality REIT managed by a subsidiary of NexPoint Advisors, LP.
NHT Holdco LLC	Hospitality REIT managed by a subsidiary of NexPoint Advisors, LP. Indirect interests held through a Delaware LLC created for the sole purpose of holding shares of the hospitality REIT. Mr. Dondero is the manager of the entity. HCMLP has demanded shares as provided in the LLC agreement but has yet to receive delivery of the shares.
Note from Hunter Mountain Investment Trust	Direct asset. Defaulted note. Subject to Litigation Trustee collecting.
Note from The Dugaboy Investment Trust ("Dugaboy")	Direct asset. Term note. Last receipt in December 2022. Next scheduled receipt in December 2023.
Notes from Mr. Dondero + his affiliates (except Dugaboy)	Direct asset. Demand notes and accelerated term notes, plus costs of collection. Subject to Claimant Trust collection litigation.
Post-sale escrows	Residual escrow(s) remaining related to the monetizations of two private companies. Direct and indirect interests through managed fund(s).
Private companies	Direct and indirect interests in two privately held companies.
Private equity fund interests	Direct or indirect interests in two private funds that make Oil & Gas and Healthcare-related investments, respectively.
SE Multifamily Holdings LLC	Direct asset. Membership interests. Subject to Claimant Trust litigation.
Other misc.	Future revenue streams; receivables; misc. investments; cash (unrestricted and reserved); litigation claims of the Litigation Trust; indemnification claims.

[10] Listing is not comprehensive, but rather is intended to capture potentially significant asset categories that have yet to be fully monetized. Listing includes assets of the Claimant Trust, HCMLP (re-organized), Litigation Trust, and HCMLP GP LLC. Descriptions herein indicate whether the asset is directly owned by one or more of these entities and/or whether the asset is indirectly beneficially owned.

HMIT Exhibit No. 78

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	
HIGHLAND CAPITAL MANAGEMENT, L.P.	Chapter 11 Case No. 19-34054-sqj11
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.	
Plaintiff,	
-vs-	Adversary Proceeding No. 21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	
Defendants.	

VIDEO DEPOSITION OF JAMES P. SEERY, JR.

New York, New York

Thursday, October 21, 2021

Reported by:
MARIANNE WITKOWSKI-SMITH
JOB NO. 201192

October 21, 2021
2:02 p.m.

Video Deposition of JAMES P. SEERY, JR., individually and on behalf of HIGHLAND CAPITAL MANAGEMENT LP, held at the offices of Pachulski Stang Ziehl & Jones LLP, 780 Third Avenue, New York, New York, before Marianne Witkowski-Smith, a Shorthand Reporter and Notary Public of the State of New York.

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THOMAS BERGHMAN, ESQ.

(Continued on Next Page)

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ALSO PRESENT:
MANUEL GARCIA, Legal Video Specialist
THANHAN NGUYEN, ESQ. (Via Zoom)
AARON LAWRENCE, ESQ. (Via Zoom)
LA ASIA CANTY (Via Zoom)

J. Seery

VIDEO TECHNICIAN: This is the start of Media Label No. 1 in the video-recorded deposition of James P. Seery Jr., in the matter of Highland Capital Management LP vs. NexPoint Advisors LP, et al., on October the 21st, 2021, at approximately 2:02 p.m.

My name is Manuel Garcia. I'm the certified legal videographer from TSG Reporting Inc. The court reporter is Marianne Smith, in association with TSG Reporting.

Counsel, please introduce yourselves.

MR. RUKAVINA: My name is Davor Rukavina. I represent NexPoint Advisors LP.

MR. MORRIS: My name is John Morris from Pachulski Stang Ziehl & Jones, on behalf of Capital -- Highland Capital Management LP, and I'm representing the witness, James P. Seery, Jr., today.

MS. DEITSCH-PEREZ: Hi. This is

J. Seery

Q. And -- and not even in a general way, other than zero to 25 million?

A. That's a pretty good range.

Q. Okay. Do you have an understanding of what the typical compensation is -- for a financial advisory CEO is for a company that has a billion or more under management?

A. It depends on the type of assets that are under management, it tends -- it depends on the performance of the assets and it depends on the cost structure of the business.

Q. And taking those things into account, can you describe for us what the compensation for a CEO of a financial advisor firm is, where there are assets under management of a billion or more?

A. When you [mean] a financial advisor, do you mean an FA type firm or do you -- financial advisor, or do you mean somebody who advises investors?

Q. I -- I'm talking about a company similar to Highland.

A. So high -- Highland is a -- is a

J. Seery

combination of types of businesses. It's basically, in the last five years, at best a melting ice cube. It receives certain management fees and then it gives away services at below cost.

So Highland was run at a loss. Typically people who run businesses that operate at an operating loss don't get paid a lot of money.

Q. Let me -- let me ask you, you're now -- you've been the CEO of Highland for a while, right?

A. That's correct.

Q. And you're going to remain the CEO for a while longer?

A. Perhaps.

Q. And do you have an expectation of how many years in total you'll likely be the CEO of Highland?

A. The less the better.

Q. But aside from that, do you have an expectation of how many years you will likely be the CEO of Highland?

A. I don't. I hope we complete the

J. Seery

monetization by 2022. Whether I'm the CEO or not that will depend on the oversight board and whether I want to continue to do it.

Q. Okay. And if you are as -- as successful as you hope to be, whatever that is, how much do you expect to make as the CEO of Highland on average for each year that you will have been the CEO of Highland?

MR. MORRIS: Objection to the form of the question.

A. I -- I don't have a particular expectation right now. I have to negotiate that, but I would expect to make a few million dollars a year.

Q. Have you not negotiated your potential contingent compensation yet?

A. I have not.

Q. What -- what do you intend to ask for?

MR. MORRIS: Objection to the form of the question.

A. I'd like to get a significant amount of money, as much as I can get and treat my team fairly, but it has to be fair

J. Seery

based on the returns that we get for the investors.

Q. So based on, if you were as -- as successful as you hope to be, what do you think that number would be on an annual basis?

(Simultaneous speaking and reporter interjection.)

MR. MORRIS: Objection to the form of the question.

A. I would expect it to be at least a few million dollars a year. If I was as successful as I think we will be, it should be significantly more than that.

Q. Okay. And so what does -- what is -- because I don't know you very well, Mr. Seery.

To you, what is significantly more than a few million a year?

A. Just to be clear, you don't know me at all. We've never met, so we'll -- we'll make sure that that's clear so we don't -- there's no implication that there's some prior relationship or that we've ever worked

J. Seery

MR. MORRIS: And, and -- and I -- and I object, you asked him if -- I just -- I, I --

MS. DEITSCH-PEREZ: Well, John --

MR. MORRIS: -- it's not -- the judge will rule.

Go ahead.

BY MS. DEITSCH-PEREZ:

Q. You've heard of -- Highland has interests in Cornerstone, Trussway and MGM, that's correct?

MR. MORRIS: Objection to the form of the question.

A. You should be precise. Highland owns certain equity interests in Cornerstone, approximately 4 percent. Highland owns, indirectly, all of the interests -- almost all of the interests in Trussway. Highland owns a small piece of MGM.

Q. Okay. And have you made any inquiry into whether employees at Highland referred to these colloquially as portfolio companies?

A. I --

J. Seery

MR. MORRIS: Object --

A. I -- I know that cornerstone is sometimes referred to as a portfolio company. I know that Trussway is referred to as a portfolio company.

It would be -- I've never heard anyone refer to as -- MGM as a portfolio company.

Q. Have you ever made an inquiry as to whether sometimes it was colloquially called a portfolio company?

A. I -- I haven't made an inquiry as to it, no. I've been around the business for a year-and-a-half, nineteen months.

Q. Have you ever heard Mr. Dondero refer to MGM as one of the portfolio companies?

A. No, I haven't. It would be very odd if he would.

Q. When you -- in the early days, when you communicated with Mr. Dondero about the prospects for the assets at Highland, did he appear to have high hopes for the monetization and increase in value of

J. Seery

Cornerstone, Trussway and MGM?

MR. MORRIS: Objection to the form of the question.

A. I don't recall him ever talking to me very much about Cornerstone and potential upside or Trussway.

He did have high hopes, or expressed high hopes, of upside value in MGM. But at the same time, he sold 1.7 million shares after the filing for 7250. So that sort of belied that optimism, but he expressed some optimism that MGM would have upside. And of course he sat on the board, so he'd have some insight into it.

Q. And it looks like, hopefully, he was right to -- in that optimism?

MR. MORRIS: Objection to the form of the question.

Q. Is that right?

A. We'll find out.

Q. So far it appears that his optimism may be justified; is that right?

A. There's -- there's a transaction. It's subject to approval and closure.

J. Seery

Q. Okay.

A. Certainly hope so.

Q. If in fact all three of those companies, MGM -- or Highland's interest in those three companies are successfully monetized, will the assets of Highland exceed its liabilities?

MR. MORRIS: Objection to the form of the question.

A. Extremely unlikely.

Q. Possible though?

MR. MORRIS: Objection to the form of the question.

Q. In your educated opinion --

(Simultaneous speaking.)

A. Can I -- can I answer your question --

Q. Yes.

A. -- unless "possible though" is just a quip, because then I won't answer it.

Q. No --

A. Is that a question?

Q. -- it's not a quip --

A. Oh, okay.

Q. -- it is a question.
A. It's -- we know what the -- at least now what the potential upside is to MGM. We don't know what the upside is for Cornerstone or Trussway, but we understand the performance of the companies and the framework with which somebody would value them.
So it would be extremely unlikely, not impossible but extremely unlikely, for those two companies - with MGM capped - to have a performance that exceeded the total amount of claims.
Q. How close a matter is it?
MR. MORRIS: Objection --
(Simultaneous speaking and reporter interjection.)
Q. How -- how close -- how close -- let me -- let me strike that and start again.
What would MGM, Trussway and Cornerstone need to be monetized for in order for the overall assets of Highland to exceed its liabilities?
MR. MORRIS: Objection to the

form of the question.
A. I'm not in a position to answer that, but all of the assets minus the expenses to get there would need to exceed $400 million.
Q. And right now, what do you think the assets are worth?
MR. MORRIS: Objection to the form of the question.
A. Again, I don't -- I know what MGM is potentially worth, but it's hard to -- I can't count that until it's done.
Q. I know but --
(Simultaneous speaking.)
MR. MORRIS: Let him finish, please let him finish.
A. You don't -- can't count that until it's done. And then the other -- the other businesses we have to put through a process, to see what they're worth. And they're, they're, they're -- they've got potential upside but they have challenges as well.
Q. Okay. Assuming you are as successful as you hope to be, and crediting

for the moment the potential value of the MGM transaction, what do you think the assets of Highland are likely to be worth?
MR. MORRIS: Objection to the form of the question.
A. I -- I don't know. Part of it depends on -- again, it's the costs. It's collection of $63 million notes in these litigations, and then it's the ultimate value of those assets.
But I would hope that we would be very successful in the asset monetization, where we would be able to get at lease $300 million with those -- those assets and others.
Q. Do you think that if you're as successful as you hope to be, that the assets will be worth more than 400 million net of the collection costs?
A. I --
MR. MORRIS: Objection to the form of the question.
A. I believe I already said I believe that's unlikely, but I'm an optimistic

fellow.
Q. So then you hope it is likely?
A. I certainly hope so.
And, again, that -- that hope counts on $63 million of note collections that I do expect to collect.
MR. MORRIS: Deborah?
MS. DEITSCH-PEREZ: Yes.
MR. MORRIS: I apologize for interrupting, but sometime between now and 6:00 I'm going to have to take about a ten or a twelve-minute break. I have no idea how much you have.
If you're going to finish in twenty minutes, then let's do that. If you're going to take more than an hour, I just -- just please stop at some point by, you know, 5:30, 5:35, so I can take that break.
I just have to attend to something that -- it won't take too long, but I just wanted to let you know that so you weren't surprised.
MS. DEITSCH-PEREZ: Okay. If

J. Seery

THE WITNESS: I said I didn't.
MR. MORRIS: He said he didn't.
THE WITNESS: I said I didn't.
BY MS. DEITSCH-PEREZ:
Q. Well, do you know if anybody did?
A. I don't know, but certainly that's something that accounting would see rather easily.
RQ* MS. DEITSCH-PEREZ: Okay. So I would like confirmation that that was looked for, and -- and the same as I requested previously, the Word versions of -- of the notes.
MR. MORRIS: Okay.
THE WITNESS: I, I -- I think that the materials that Mr. Morris described has all that with bank statements.
MR. MORRIS: It's okay, thank you.
Are we done?
MS. DEITSCH-PEREZ: Thank you.
MR. MORRIS: Yep.
MS. DEITSCH-PEREZ: Yes.

J. Seery

VIDEO TECHNICIAN: The time is 6:49. This concludes today's deposition, Thursday, October 21, 2021.

I, , do hereby certify under penalty of perjury that I have read the foregoing transcript of my deposition taken on ; that I have made such corrections as appear noted herein in ink, initialed by me; that my testimony as contained herein, as corrected, is true and correct.

DATED this ____ day of _____, 20 ,
at _____, .

_____
JAMES P. SEERY, JR.

C E R T I F I C A T E

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

I, MARIANNE WITKOWSKI-SMITH, a Notary Public within and for the State of New York, do hereby certify:
That JAMES P. SEERY, JR., the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by the witness.
I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.
IN WITNESS WHEREOF, I have hereunto set my hand this 22nd day of October, 2021.

MARIANNE WITKOWSKI-SMITH

I N D E X

(Continued on Next Page)

----------EXHIBITS(Cont'd)----------

EXHIBIT	PAGE	LINE
Exhibit 5		
Promissory Note		
Dated May 31, 2017	55	12
Exhibit 6		
Correspondence		
Dated January 7, 2021	69	16
Exhibit 7		
Loan Document		
D-NNL-029141	99	12
Exhibit 8		
Correspondence		
Dated January 15, 2021	107	4
Exhibit 9		
Amended and Restated		
Shared Services Agreement	112	22
Exhibit 10		
Email Chain		
D-NNL-007578 - D-NNL-007579	148	11
Exhibit 11		
Email Chain		
D-NNL-028514 - D-NNL-028515	150	3

* * *

PREMARKED EXHIBITS	PAGE	LINE
(Not Provided to Reporter)		
Exhibit 109	245	16
Exhibit 110	206	23
Exhibit 111	196	8
Exhibit 112	213	23

ERRATA SHEET

Case Name:

Deposition Date:

Deponent:

Pg.	No.	Now Reads	Should Read	Reason
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Signature of Deponent

SUBSCRIBED AND SWORN BEFORE ME

THIS ____ DAY OF _____, 2021.

_____

(Notary Public) MY COMMISSION EXPIRES:_____

HMIT Exhibit No. 79

Case Study – Large Loan Origination

Debt origination for an affiliate of Simon Property Group Inc. and Farallon Capital Management

Date	June 2007
Asset Class	Retail
Asset Size	1,808,506 Sq. Ft.
Sponsor	Simon Property Group Inc. / Farallon Capital Management
Transaction Type	Refinance
Total Debt Amount	Lehman Brothers: $121 million JP Morgan: $200 million

Transaction Overview

- In June 2007, Lehman Brothers co-originated a loan in the aggregate amount of $321 million (Lehman portion: $121 million) with JP Morgan to a special purpose affiliate of a joint venture between Simon Property Group Inc ("Simon") and Farallon Capital Management ("Farallon") secured by the shopping center known as Gurnee Mills Mall (the "Property") located in Gurnee, IL .
- The Property consists of a one-story, 200 store discount mega-mall comprised of 1,808,506 square feet anchored by Burlington Coat Factory, Marshalls, Bed Bath & Beyond and Kohls among other national retailers. Built in 1991, the Property underwent a $5 million interior renovation in addition to a $71 million redevelopment between 2004 and 2005. As of March 2007, the Property had a in-line occupancy of 99.5%.

Lehman Brothers Role

- Simon and Farallon comprised the sponsorship which eventually merged with The Mills Corporation in early 2007 for $25.25 per common share in cash. The total value of the transaction was approximately $1.64 billion for all of the outstanding common stock, and approximately $7.9 billion including assumed debt and preferred equity.
- Lehman and JP Morgan subsequently co-originated $321 million loan at 79.2% LTV based on an appraisal completed in March by Cushman & Wakefield. The Loan was used to refinance the indebtedness secured by the Property.

Sponsorship Overview

- The Mills Corporation, based in Chevy Chase MD is a developer owner and manager of a diversified portfolio of retail destinations including regional shopping malls and entertainment centers. They currently own 38 properties in the United States totaling 47 million square feet.

HMIT Exhibit No. 80

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Attorneys for the Steering Group

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
BLOCKBUSTER INC., *et al.*,	:	Case No. 10-14997 (BRL)
Debtors.	:	(Jointly Administered)

THE BACKSTOP LENDERS' OBJECTION TO THE MOTION OF LYME REGIS TO ABANDON CERTAIN CAUSES OF ACTION OR, IN THE ALTERNATIVE, TO GRANT STANDING TO LYME REGIS TO PURSUE CLAIMS ON BEHALF OF THE ESTATE

1. The Steering Group of Senior Secured Noteholders who are Backstop Lenders -- Icahn Capital LP, Monarch Alternative Capital LP, Owl Creek Asset Management, L.P., Stonehill Capital Management LLC, and Värde Partners, Inc. (collectively, the "Backstop Lenders") -- hereby file this objection (the "Objection") to the Motion of Lyme Regis Partners, LLC ("Lyme Regis") to Abandon Certain Causes of Action or, in the Alternative, to Grant Standing to Lyme Regis to Pursue Claims on Behalf of the Estate (the "Motion") [Docket No. 593].

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	)	Case No. 19-34054-sgj11
Reorganized Debtor.	)	

HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND CLAIMANT TRUST, AND JAMES P. SEERY, JR.'S JOINT MOTION TO EXCLUDE TESTIMONY AND DOCUMENTS OF SCOTT VAN METER AND STEVE PULLY

[1] Highland's last four digits of its taxpayer identification number are (8357). The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases *Page(s)*

Other Authorities

Highland Capital Management, L.P. ("HCMLP" or "Debtor"), the reorganized debtor in the above-referenced action, the Highland Claimant Trust (the "Trust"; together with HCMLP, "Highland"), and James P. Seery, Jr., HCMLP's Chief Executive Officer and the Claimant Trustee of the Trust ("Seery"; together with Highland, the "Highland Parties"), by and through their undersigned counsel, hereby file this joint motion to exclude the testimony and documents of Scott Van Meter ("Van Meter") and Steve Pully ("Pully"; together with Van Meter, the "Purported Experts") from the June 8, 2023 hearing (the "Hearing") regarding Hunter Mountain Investment Trust's ("HMIT") Emergency Motion for Leave to File Verified Adversary Petition ("Motion for Leave"; Dkt. No. 3699). In support of their Joint Motion, the Highland Parties state as follows:

PRELIMINARY STATEMENT

1. HMIT filed its Motion for Leave on an emergency basis on March 28, 2023. During more than two months of litigation on this Motion, which included five briefs and two Court conferences, HMIT repeatedly sought to limit this Court's analysis to the "four corners" of HMIT's proposed complaint, and no party made any mention of expert witnesses. On June 5, 2023, at 10:12 PM, less than 60 hours before the Hearing, HMIT disclosed for the first time Van Meter and Pully as expert witnesses with 14 accompanying documents. This Court should not permit HMIT to engage in such obvious gamesmanship and conduct a "trial by ambush."

2. ***First,*** HMIT's attempt to introduce expert testimony flies in the face of this Court's May 22 and 26, 2023 Orders regarding the Hearing and the scope of discovery. HMIT has been trying to have it both ways. HMIT submitted more than 300 pages of exhibits with its Motion for Leave, including a declaration from James Dondero ("Dondero"), but has sought to prevent any discovery or cross-examination of Dondero, claiming this Court can review only the "four corners" of the document. To ensure a fair Hearing while addressing HMIT's concern, this Court held that it would hold an evidentiary hearing, including testimony from declarants, and permitted

depositions of Dondero and Seery, but no other discovery. HMIT's attempt to vastly expand the scope of testimony with two Purported Expert directly contradicts its own positions and is contrary to the Hearing contemplated by this Court's Orders.

3. ***Second,*** HMIT's eleventh-hour disclosure of two Purported Experts and 14 accompanying documents is an attempt to conduct a "trial by ambush." HMIT never mentioned any experts in five briefs or two Court conferences. By strategically waiting until three days before the Hearing to disclose these Purported Experts, HMIT has insulated its Purported Experts from any discovery and deprived the Highland Parties of the opportunity to retain their own experts.

4. ***Finally,*** the Purported Experts are inadmissible because they do not satisfy the requirements of Federal Rule of Evidence 702 and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993): (1) Van Meter is not qualified to opine about compensation or claims trading; (2) HMIT failed to carry its burden to show that the Purported Expert's opinions are based on a reliable methodology; (3) the Purported Experts' analysis is unreliable; (4) the Purported Experts' opinions are not proper expert testimony because they parrot the allegations of HMIT's proposed complaint and their analysis consists of arithmetic; and (5) the Purported Experts offer improper legal conclusions.

5. Accordingly, this Court should exclude the Purported Experts and HMIT's Exhibits 39 to 52 from the Hearing.

RELEVANT BACKGROUND

6. On March 28, 2023, HMIT filed its Motion for Leave, which totaled 387 pages with exhibits, including sworn declarations from Dondero. HMIT expressly relied on Dondero's declarations and other exhibits throughout its Motion for Leave. (*See, e. g.*, Motion for Leave ¶¶ 32, 44, 46.) HMIT argued that this "objective evidence" and "HMIT's proposed Verified Adversary Proceeding" complaint supported its Motion. (*Id.* ¶ 1 & n.2.)

7. On April 21, 2023, HMIT filed Objections Regarding Evidentiary Hearing and Brief Concerning Gatekeeper Proceeding Relating to "Colorability." (Dkt. No. 3758.) HMIT objected to "any evidentiary hearing" regarding its Motion for Leave, including "the related attached declarations." (*Id.* ¶ 1.) HMIT argued that, to decide its Motion, this Court should consider only HMIT's proposed complaint the Proposed Complaint and "documents attached to or referred to" therein. (*Id.* ¶ 7.)

8. On April 23, 2023, HMIT filed a Supplement to Emergency Motion for Leave to File Verified Adversary Proceeding (Dkt. No. 3760), which appended a revised proposed adversary complaint ("Proposed Complaint" or "Compl."; Dkt. No. 3760-1).

9. On April 24, 2023, this Court held a conference regarding HMIT's Motion for Leave. During the conference, counsel for HMIT argued that this Court does not "need to consider the Dondero affidavits" or "any of the documents that are actually associated with [HMIT's] motion," and this Court is "relegated to the four corners of the actual complaint itself." (Ex. A (Apr. 24, 2023 Conf. Tr.) at 20:3–19.)[2] When this Court asked whether HMIT was seeking to withdraw the Dondero declarations and other supporting evidence, HMIT's counsel responded that "[i]f the Court is suggesting that if [HMIT] leave[s] the affidavits attached to the motion that the Court is going to allow this to become, effectively, a trial on the merits . . . then the answer is we would not want to withdraw them but we will." (*Id.* at 21:11–20.) HMIT did not withdraw any exhibits or re-file its Motion.

10. On May 11, 2023, the Highland Parties filed their joint response to HMIT's Motion for Leave, which appended additional documents to respond to the allegations in the Proposed Complaint and HMIT's exhibits. (Dkt. No. 3783.) On May 18, 2023, HMIT filed its Reply in

[2] All references to "Ex." refer to the accompanying declaration of Joshua S. Levy.

support of its Motion for Leave. ("Reply"; Dkt. No. 3785.) HMIT purported to "provide[] notice that it withdraws all affidavits and other evidence attached to its Motion for Leave," but this was "subject to a reservation of rights that, in the event the Court concludes it will conduct an evidentiary hearing, HMIT may offer the same evidence at the hearing," and also "reserve[d] all rights "to conduct merits-based discovery before the hearing." (Reply ¶ 17.) HMIT's Reply did not reference any expert testimony or discovery.

11. On May 22, 2023, this Court issued an Order ("May 22 Order"; Dkt. No. 3787) holding that "there may be mixed questions of fact and law implicated by the Motion for Leave," so "the parties will be permitted to present evidence (including witness testimony) at the June 8, 2023 hearing if they so choose. This may include examining any witness for whom a Declaration or Affidavit has already been filed." (May 22 Order at 1-2.)

12. On May 24, 2023, HMIT filed an Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of the June 8, 2023 Hearing ("Discovery Motion"; Dkt. No. 3788). HMIT stated that it "continues to object that any evidentiary hearing relating to the Motion for Leave is inappropriate," but requested that this Court permit HMIT to obtain extensive document discovery from and take depositions of the Claims Purchasers[3] and the Highland Parties. (Discovery Motion ¶ 8.)

13. On May 26, 2023, this Court held a conference on HMIT's Discovery Motion. During the conference, this Court noted that HMIT had not actually withdrawn the Dondero declarations or other evidence and explained, "[i]f you want to refile the motion, merely redacting those sentences that refer to the Dondero affidavit and not filing the Dondero affidavit, I'll let you." (Ex. B (May 26, 2023 Conf. Tr.) at 48:17–22, 59:9–17.) This Court also asked HMIT's

[3] The "Claims Purchasers" refers to, collectively, Muck Holdings, LLC, Jessup Holdings, LLC, Farallon Capital Management, LLC ("Farallon"), and Stonehill Capital Management, LLC ("Stonehill").

counsel multiple times how HMIT would prefer this Court conduct the Hearing. (*Id.* at 9:20–10:1 ("Tell me what is your first choice of what you want here, okay? I'm just trying to understand."); *id.* at 12:7-13 ("I'm trying to get at how we do what you want the Court to do."); *id.* at 13:6–12 ("I'm asking what . . . you want, okay? Quit saying if that's what the Court wants. . . . Tell me what you want, okay?").) HMIT's counsel responded that HMIT "believes the [Hearing] should be conducted on the pleading only and no extraneous evidence offered, including Mr. Dondero's affidavit. That is what we want.").

14. After the conference, this Court issued an Order (the "May 26 Order"; Dkt No. 3798) holding that "Mr. Seery and Mr. Dondero shall be made available for depositions," "no discovery or depositions of any other party or witness will be permitted prior to the June 8 hearing," and "[n]one of the parties shall be entitled to any other discovery, including the production of documents from Mr. Seery or Mr. Dondero, or any other party or witness . . . prior to the conduct of the Depositions or to the court's ruling on the Motion for Leave following the June 8, 2023 hearing." (May 26 Order at 2.)

15. On June 5, 2023, HMIT filed a revised version of its Motion for Leave redacting certain citations to the Dondero declarations and other exhibits, but not redacting the factual assertions based on those exhibits. (Dkt. No. 3815.) After Mr. Seery's counsel informed HMIT's counsel of this deficiency (Ex. C), HMIT filed another revised version of its Motion to Leave with additional redactions (Dkt. No. 3816.) However, HMIT refused to redact the factual assertions based on the Dondero declarations it purported to withdraw. (Ex. C.)

16. On June 5, 2023, at 10:12 PM Central Time, HMIT filed its witness and exhibit list for the Hearing ("HMIT List"; Dkt. No. 3818) disclosing Van Meter, Pully, and 14 accompanying

documents. This is the first time HMIT disclosed it intended to use expert testimony and documents at the Hearing.

ARGUMENT

I. This Court Should Reject HMIT's Eleventh-Hour Attempt To Introduce Expert Testimony And Documents.

A. Expert Testimony And Documents Are Inconsistent With This Court's Orders Regarding The Hearing.

17. It is settled law that this Court has "broad discretion" to determine the scope of discovery for a contested matter, because it is "in the best position to weigh fairly the competing needs and interests of parties affected by discovery." *In re Dernick*, 2019 WL 5078632, at *4 (Bankr. S.D. Tex. Sept. 10, 2019) (cleaned up); *see also* Fed. R. Bankr. P. 9014(c) (providing rules governing discovery in contested matters "unless the court directs otherwise"). "Based on the court's review of all the parties' pleadings and briefing," this Court permitted the parties "to present evidence (including witness testimony) at the June 8, 2023 hearing," which "may include examining any witness for whom a Declaration or Affidavit has already been filed." (May 22 Order at 1–2.) At HMIT's request, this Court limited the scope of discovery to depositions of Seery and Dondero, holding that "[n]one of the parties shall be entitled to any other discovery." (May 26 Order at 2.) Thus, this Court did not contemplate any expert discovery, testimony, or documents in connection with the Hearing.

18. This is unsurprising because no party ever mentioned that it planned to use any experts at the Hearing. To the contrary, HMIT repeatedly represented to this Court that it should limit its analysis to the "four corners" of the proposed complaint. (*See supra* ¶¶ 6–16.) HMIT now seeks to vastly expand the scope of the Hearing by introducing testimony and 14 exhibits from two Purported Experts. HMIT "hid[] the ball" regarding its Purported Experts, secured an Order limiting the scope of discovery, and now seeks to sandbag the Highland Parties with

Purported Experts from whom the Highland Parties had no opportunity to take discovery. *Hernandez v. Results Staffing, Inc.*, 907 F.3d 354, 363 (5th Cir. 2018) (cleaned up). This Court should reject HMIT's "gamesmanship and deception" by excluding the Purported Experts and related documents from the Hearing. *Id.* ("Our system of discovery was designed to increase the likelihood that justice will be served in each case, not to promote principles of gamesmanship and deception in which the person who hides the ball most effectively wins the case.") (cleaned up).

B. HMIT Is Trying To Conduct An Impermissible "Trial By Ambush."

19. Under Fifth Circuit precedent, "each party is entitled to know what is being tried, or at least to the means to find out. Notice remains a first-reader element of procedural due process, and trial by ambush is no more favored here than elsewhere." *In re Cathey*, 2021 WL 2492851, at *2 (Bankr. N.D. Miss. June 17, 2021) (quoting *Jimenez v. Tuna Vessel Granada*, 652 F.2d 415, 420 (5th Cir. 1981)). HMIT "ambushed" the Highland Parties with expert materials it never mentioned in five briefs or two Court conferences. *Id.* Had HMIT timely disclosed the Purported Experts, the Highland Parties would have had the opportunity to depose them and to retain their own experts. *See* Fed. R. Civ. P. 26(b)(4)(A) ("A party may depose any person who has been identified as an expert whose opinions may be presented at trial."); Fed. R. Bankr. P. 9014(b) (applying Rule 26(b)(4)(A) to contested matters); Fed R. Bankr. P. 7026. Indeed, the purpose of these Rules is "to make depositions of testifying experts routinely available." 8A Charles A. Wright, Arthur R. Miller, et al., Federal Practice and Procedure § 2029 (3d ed. 2023). But HMIT strategically waited to disclose the Purported Experts until after 10 PM three days before the Hearing, making it effectively impossible for the Highland Parties to depose them or to retain their own experts.

20. Worse, as discussed above, HMIT obtained an Order from this Court limiting discovery to the depositions of Seery and Dondero and precluding any document discovery.

(May 26 Order at 2.) Thus, HMIT ensured that it could insulate its Purported Experts from any discovery and ambush the Highland Parties at the Hearing. This Court should not reward HMIT's gamesmanship by admitting expert material or permitting further delay on HMIT's Motion for Leave. This Court should exclude HMIT's Purported Experts and accompanying documents and conduct the Hearing on June 8, 2023 consistent with its May 22 and 26 Orders.

II. The Purported Experts Should Be Excluded Under Rule 702 And *Daubert*.

21. Federal Rule of Evidence 702 "assign[s] to the trial judge" the "gatekeeping role" of ensuring that only reliable expert testimony is admitted. *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). "[T]rial courts [] act as 'gate-keepers,' making a 'preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.'" *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. 2002) (quoting *Daubert*, 509 U.S. at 592–93). "Qualification of an expert is a central part of the court's determination." *Buttross Props. v. Underwriters at Lloyds London*, 2017 WL 9362700, at *1 (W.D. Tex. Sept. 12, 2017) (collecting cases). "[T]he party putting forth the expert testimony has the burden of showing that the testimony is reliable" pursuant to *Daubert*. *In re USA Promlite Tech. Inc.*, 2022 WL 12025687, at *5 (Bankr. S.D. Tex. Oct. 20, 2022). HMIT fails to satisfy its burden for the Purported Experts.

22. ***First***, Van Meter is not qualified to opine about "Seery's compensation and claims trading." (HMIT List at 2.) Van Meter has never worked as a compensation consultant, has never conducted any compensation "market study," and has never before opined about "incentive-based compensation." (*Id.* at 2–3; *see* HMIT Ex. 39 (Van Meter CV).) Van Meter likewise has neither traded any bankruptcy claims nor analyzed any claims trading. (*Id.*) Van Meter thus lacks the "knowledge, skill, experience, training, or education" to opine about these issues. Fed. R. Evid. 702. Van Meter is an accountant and lawyer who bills himself "as an independent expert on

matters of economic damages/quantum, accounting and auditing standards, corporate governance and forensic accounting." (HMIT Ex. 39 (Van Meter CV) at 1.) Van Meter's limited bankruptcy experience consists of serving as a "[s]olvency and damages expert," "financial advisor," or "counsel," not analyzing compensation or claims trading. (*Id.* at 5–7.) "[Q]ualification to testify as an expert [] requires that the area of the witness's competence ***matches*** the subject matter of the witness's testimony," and "courts will prevent a witness from testifying as an expert where the witness has specialized knowledge on one subject but offers to testify on a different subject." 29 Wright & Miller, Federal Practice and Procedure § 6264.2 (emphasis added) (collecting cases).

23. ***Second***, HMIT does not even try to satisfy its burden to show that the Purported Experts' opinions are "the product of reliable principles and methods." Fed. R. Evid. 702(c). "To establish reliability under *Daubert*, an expert must provide objective, independent support for his methodology." *USA Promlite*, 2022 WL 12025687, at *7 (collecting cases). Neither of the Purported Experts provide any methodology at all. Van Meter claims to have "identified red flags" without explaining what they are, why they are "red flags," or how he determined they were "red flags." (HMIT List at 3.) Nor does Van Meter provide any basis for his assertion that Seery's compensation "was not reasonable and is excessive." (*Id.*) Pully speculates about "economic returns [Farallon and Stonehill] would normally hope to realize," the "likelihood that inappropriate information was provided to the[m]," and their "investment requirements," but never explains how he arrived at these opinions. (*Id.* at 4.) "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a [bankruptcy] court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *LeBlanc ex rel. Estate of LeBlanc v. Chevron USA, Inc.*, 396 F. App'x 94, 100 (5th Cir. 2010) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). "Because no methodology for the conclusion was provided, the Court cannot determine whether

that methodology was reasonable, and thus, the conclusion itself is not admissible under Rule 702 and *Daubert*." *USA Promlite*, 2022 WL 12025687, at *7; *see also Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 635 (8th Cir. 2007) ("The proffer of [expert]'s testimony was properly rejected because [expert] employed no methodology whatsoever—reliable or otherwise.").

24. ***Third***, the Purported Experts' opinions are unreliable. "[T]he expert's testimony must be reliable at each and every step or else it is inadmissible," and "cherry-picked data" "belie[s] the reliability of [an expert's] methodology." *Burst v. Shell Oil Co.*, 650 F. App'x 170, 174 (5th Cir. 2016) (quoting *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 354–55 (5th Cir. 2007)). Pully's "Analysis of Farallon and Stonehill Claims Purchase" do not use actual data but instead rely on HMIT's complaint appended as "Exhibit 1-A to Emergency Motion filed on 4/23/23." (HMIT Exs. 49–50.) And HMIT admits that the Purported Experts have not "review[ed] Mr. Seery's deposition testimony" (HMIT List at 3–4)—the only testimony proffered in connection with the Motion for Leave—which suggests they were hired ***after*** the deposition to blindside the Highland Parties at the Hearing. "[W]hen," as here, "an expert's testimony is 'not based upon the facts in the record but on altered facts and speculation designed to bolster [a party's] position,' it should be excluded." *Loy v. Rehab Synergies, LLC*, 558 F. Supp. 3d 402, 415 (S.D. Tex. 2021) (quoting *Guillory v. Domtar Indus., Inc.*, 95 F.3d 1320, 1331 (5th Cir. 1996)) (excluding as unreliable expert analysis based "on the spreadsheet created by Plaintiffs' counsel").

25. ***Fourth***, the Proposed Experts' opinions simply repeat the allegations in HMIT's proposed complaint and their analysis (*see* HMIT Exs. 41–45, 48–52) consist entirely of arithmetic, which is not proper expert testimony. *See* Fed. R. Evid. 702(a) (requiring expert testimony to "help the trier of fact to understand the evidence or to determine a fact in issue"). "An expert who parrots an out-of-court statement is not giving expert testimony; he is a

ventriloquist's dummy." *Robroy Indus.-Texas, LLC v. Thomas & Betts Corp.*, 2017 WL 1319553, at *9 (E.D. Tex. Apr. 10, 2017) (quoting *United States v. Brownlee*, 741 F.3d 479, 482 (7th Cir. 2014) (Posner, J.)). And "simple calculations can be easily accomplished by the trier of fact, and therefore, even if they are reliable, they are not helpful." *Anderson v. Techtronic Indus. N. Am., Inc.*, 2015 WL 12843836, at *4 (M.D. Fla. Apr. 14, 2015) (excluding expert's opinion regarding economic feasibility); *see also* Wright & Miller, Federal Practice and Procedure § 6265.2 ("[E]xpert testimony does not help where the jury has no need for an opinion because the jury can easily reach reliable conclusions based on common sense, common experience, the jury's own perceptions, or simple logic."). Indeed, HMIT included some of these same calculations in its Proposed Complaint. (*See, e.g.*, Compl. ¶ 42.)

26. ***Finally***, the Purported Experts seek to offer improper legal opinions about the ultimate issues in HMIT's Motion for Leave. "[A]llowing an expert to give his opinion on the legal conclusions to be drawn from the evidence both invades the court's province and is irrelevant." *In re Blankenship*, 2013 WL 3712428, at *2 (Bankr. N.D. Miss. July 12, 2013) (quoting *Owen v. Kerr-McGee Corp.*, 698 F.2d 236 (5th Cir. 1983)). Both Purported Experts opine about whether HMIT has "plausibly" alleged that Farallon and Stonehill purchased claims with "inappropriate information" (HMIT List at 3–4), which is precisely what HMIT seeks to show in its Motion (*see, e.g.*, Motion for Leave ¶ 42 ("[T]his Court's gatekeeping inquiry is properly limited to whether HMIT has stated a plausible claim on the face of the proposed pleadings involving 'bad faith,' 'willful misconduct,' or 'fraud.'")).

CONCLUSION

27. For the foregoing reasons, the Highland Parties respectfully request that this Court exclude from the Hearing the Purported Experts' testimony and HMIT's Exhibits 39 to 52.

Dated: June 7, 2023

PACHULSKI STANG ZIEHL & JONES LLP

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CERTIFICATE OF CONFERENCE

On June 6, 2023, counsel for Seery emailed counsel for HMIT objecting to HMIT's intention to call expert witnesses and introduce expert materials at the Hearing and requesting that HMIT's counsel inform the Highland Parties whether HMIT would consent to remove these witnesses and materials from HMIT's witness and exhibit lists. On June 7, 2023, counsel for HMIT responded that, without waiving its prior objections concerning the evidentiary format of the Hearing, HMIT did not agree to withdraw its experts or the expert materials identified on its witness and exhibit list.

/s/ Joshua S. Levy

Joshua S. Levy

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Counsel for James P. Seery, Jr.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	)	Case No. 19-34054-sgj11
Reorganized Debtor.	)	

DECLARATION OF JOSHUA S. LEVY IN SUPPORT OF HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND CLAIMANT TRUST, AND JAMES P. SEERY, JR.'S JOINT MOTION TO EXCLUDE TESTIMONY AND DOCUMENTS OF SCOTT VAN METER AND STEVE PULLY

[1] Highland's last four digits of its taxpayer identification number are (8357). The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

I, Joshua S. Levy, pursuant to 28 U.S.C. § 1746, under penalty of perjury, declare as follows:

1. I am counsel at the law firm of Willkie Farr & Gallagher LLP, counsel to James P. Seery Jr., the Chief Executive Officer of Highland Capital Management, L.P ("HCMLP") the Claimant Trustee of the Trust in the above-referenced bankruptcy case. I submit this declaration (the "Declaration") in support of *Highland Capital Management, L.P., Highland Claimant Trust* (the "Trust" and together with HCMLP, "Highland"), *and James P. Seery Jr.'s Joint Motion to Exclude Testimony and Documents of Scott Van Meter and Steve Pully* being filed simultaneously with this Declaration by Highland and Mr. Seery. This Declaration is based on my personal knowledge and review of the documents listed below.

2. Attached as **Exhibit A** is a true and correct copy of the transcript of the hearing held in this matter on April 24, 2023.

3. Attached as **Exhibit B** is a true and correct copy of the transcript of the hearing held in this matter on May 26, 2023.

4. Attached as **Exhibit C** is a true and correct copy of an email exchange between Mark T. Stancil, Sawnie A. McEntire, and Roger L. McLeary, dated from June 1, 2023 to June 5, 2023.

Dated: June 7, 2023.

/s/ Joshua S. Levy
Joshua S. Levy

EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	April 24, 2023
	1:30 p.m. Docket
Reorganized Debtor.	
	- DUGABOY INVESTMENT TRUST AND HUNTER MOUNTAIN INVESTMENT TRUST'S MOTION FOR LEAVE TO FILE PROCEEDING (3662)
	- STATUS CONFERENCE RE: MOTION FOR LEAVE TO FILE VERIFIED ADVERSARY PROCEEDING FILED BY CREDITOR HUNTER MOUNTAIN INVESTMENT TRUST (3699)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

DALLAS, TEXAS - APRIL 24, 2023 - 1:39 P.M.

THE COURT: I will now turn to our Highland matters. We have two of them. The first one we had scheduled I think may have been worked out, but it is the Dugaboy and Hunter Mountain adversary proceeding -- or, well, not adversary proceeding, a motion for leave to file an adversary proceeding regarding valuation. This is Case No. 19-34054.

Who do we have appearing for the Movant this afternoon?

MS. DEITSCH-PEREZ: Good morning, Your Honor. This is Deborah Deitsch-Perez from Stinson for the Movants.

THE COURT: All right. Thank you. Do we have you representing both Movants, Ms. Deitsch-Perez?

MS. DEITSCH-PEREZ: That's correct.

THE COURT: All right. Mr. Morris, I see you have your video turned on. You're representing the Debtor today, or Reorganized Debtor; is that correct?

MR. MORRIS: Yes, Your Honor. Good afternoon.

THE COURT: Good afternoon.

Do we have any other appearances on this matter?

All right. Well, am I correct you've worked out something procedurally on this?

MS. DEITSCH-PEREZ: Yeah, let me report. We have been negotiating over several weeks about information to be provided to the Movants, and additional information was indeed provided on Friday. I don't know if you've noticed, but the

reports have an additional section with some additional information.

We're going through it. We think there are probably still some -- some additional information that we need, and so we will first reach out to Mr. Morris and attempt to negotiate over that information. And if we are successful, wonderful. If we are unsuccessful, because the Debtor has agreed that a gatekeeper motion is not necessary since the adversary would just be seeking a valuation and not monetary or other relief, we will then proceed to -- if we cannot work things out with the Debtor, we'll proceed to file an adversary, which will be slightly different than the one that was attached to the gatekeeper motion because we will explain what additional information is needed and why the information we have is not sufficient. So it should narrow the scope of the adversary.

THE COURT: All right. Thank you. Mr. Morris, anything you want to add??

MR. MORRIS: Yes, just briefly, Your Honor. The Reorganized Debtor does not believe Hunter Mountain or Dugaboy is entitled to any information whatsoever. They certainly have no legal right to the information. It's why they have to pursue equitable -- an equitable claim. Not an equitable right, but an equitable claim.

Counsel is certainly correct that we negotiated in good faith to try to provide the information that the Reorganized

Debtors believed was -- might be useful to the extent that someone was really interested in settling the case. We were unable to come to an agreement. So, under Mr. Seery's leadership, we acted unilaterally. We produced a wealth of information on Friday night, including claims data, cash, cash in reserve, cash in the Claimant Trust, assets, general descriptions of assets that remain.

If they want to pursue a lawsuit, we'll accept service, with the proviso that we set forth in our opposition to the original motion, and that is everybody will be held accountable for unsupported and unsubstantiated allegations.

But the ball is in their court. We have produced what we're prepared to produce. If they want to continue with litigation, I guess that's what we'll do.

MS. DEITSCH-PEREZ: Well, we hope that the Debtor will continue to negotiate and will hear why we explain -- when we explain why the information isn't enough. So, ever the optimist, I hold out some hope that we will be able to do this, if not through this proceeding, through the motion for a greater stay and for mediation that's also before Your Honor.

So, one way or the other, we do hope to resolve this. If we can't, we will bring the adversary. And I thank you, Mr. Morris, for agreeing to accept service.

THE COURT: All right. Just a procedural question. Ms. Deitsch-Perez, will you be actually withdrawing this

motion for leave, or are you all doing some sort of order setting forth what you've all agreed to and announced? Just let me know, so I know what to be expecting.

MS. DEITSCH-PEREZ: I think we will try to have an agreed order to enforce what we're doing. If we fail in that, I don't suppose it matters very much. We can withdraw the application and just proceed to file the adversary. I'd rather get an agreed order up, though, setting forth that the Debtor has agreed that a gatekeeper is not necessary and that, as a result, we'll be filing the adversary. So, that's what I hope, Your Honor, we'll get.

THE COURT: All right. Well, just for the record, it doesn't really matter to me whether you withdraw it or I have an agreed order. I'm just trying to simplify life. I know sometimes the Clerk's Office personnel will reach out -- we need an order, we need an order, we need an order -- if there's a motion pending that doesn't have an order to match to it, and I'm just trying to avoid headaches in that regard.

MS. DEITSCH-PEREZ: That's why we'll make it clear what we do one way or the other.

THE COURT: Very good.

MR. MORRIS: Your Honor, just for the Court's convenience, I apologize that I don't have the docket numbers, but the information that we posted and we intended to and did post it on the docket so that it was available to everybody

equally, it's at the back of the two quarterly operating reports. There's one filed on behalf of the Reorganized Debtor and then there's one filed on behalf of the Claimant Trust. But I believe the information in the back of each of those reports is the same.

So, just in case the Court has any curiosity about what we've disclosed, I just wanted to make sure Your Honor knew where to find it.

THE COURT: Okay. I've got the docket right in front of me, and I see on Friday Docket No. 3756 was filed by the Reorganized Debtor, Post-Confirmation Report, and then Docket 3757 was filed by the Claimant Trust. So, thank you. I've noted those if we want to go back and look.

All right. Well, that concludes this Dugaboy/Hunter Trust motion for leave.

Let's now turn to the other Hunter Mountain motion for leave. We have a status conference -- I think it's a hearing on what kind of hearing we're going to have -- on Docket Entry No. 3699. So we probably have a larger appearance list on this one, so I'll do roll call.

Appearing for Hunter Mountain, who do we have?

MR. MCENTIRE: Good afternoon, Your Honor. This is Sawnie McEntire and my partner Roger McCleary with Parsons McEntire McCleary representing Hunter Mountain.

THE COURT: Okay. Now I'm going to just do a roll

call. For the Reorganized Debtor, Mr. Morris, will you be taking the lead on that?

MR. MORRIS: Yes, I will, Your Honor. Good afternoon.

THE COURT: Good afternoon.

All right. We have four, potentially, named Claims Purchasers. So I'll ask, who do we have representing Muck Holdings?

MR. MCILWAIN: Your Honor, Brent McIlwain here from Holland & Knight. I represent Farallon Capital Management, Stonehill Capital Management, Muck Holdings, and Jessup Holdings, LLC.

THE COURT: Okay. So you represent all four of the Claims Purchasers?

MR. MCILWAIN: That's correct, Your Honor.

THE COURT: All right. James Seery is a potential Defendant identified. Who do we have representing Mr. Seery?

MR. STANCIL: Good afternoon, Your Honor. This is Mark Stancil from Willkie Farr & Gallagher. I'm joined by my colleague Josh Levy and our co-counsel from Reed Smith, Omar Alaniz.

THE COURT: All right. Thank you.

Do we have any other lawyers appearing in this?

MR. STANCIL: I think that's it, Your Honor.

THE COURT: All right. Well, so, again, I think

we're having a hearing on what kind of hearing we're going to have on your motion for leave, Mr. McEntire. What did you want to say?

MR. MCENTIRE: Well, that's correct, Your Honor. Good afternoon again.

I think there are several issues before the Court during this status conference. One is the date of the hearing. I think we certainly preliminarily had agreed over the last 10 days that May 18 was the logical date in light of the motion practice.

The length of the hearing, Mr. Morris has suggested over four hours or approximately four hours. I've suggested one and a half hours.

And then there is an issue about whether or not evidence should be allowed.

There is a fourth issue that I just want to make sure that the Court is aware. I don't want to be accused of waiting this issue as the proceedings progress. And that is we have raised an issue about Mr. Morris's representation and whether he has a conflict of interest. We did this in writing in our reply brief several weeks ago. As a consequence, Mr. Seery now has new counsel, Mr. Morris of course to represent the Highland parties, the Reorganized Debtor and the Claimant -- the Highland Claimant Trust. We are concerned that he has a conflict of interest. It is unclear from whom he is taking

his direction or from whom he is deriving his authority.

And equally important if not more important, he is taking positions that are inconsistent with the best interests of the Reorganized Debtor and the Claimant Trust.

I don't think this is the type of issue that could be resolved today. However, I want to make sure it's on the record so I'm not accused of waiting as we proceed. But otherwise, it's the date of the hearing, the length of the hearing, and whether or not evidence is allowed.

I'm prepared to address the merits of our thoughts on each of those last three -- the date, the length, and the evidence issues -- if the Court wishes, or I could wait until after other counsel have made their comments. But I'm prepared to move forward as the Court wishes.

THE COURT: All right. Well, I am not going to address a conflicts of interest issue today. I think I heard you saying you don't anticipate the Court would. But I don't have any sort of pleading in front of me on that, so we'll just make that clear from the get-go.

One of the reasons I'm making that clear from the get-go is I have not read the brief you filed I don't know what time on Friday, Docket No. 3758, Mr. McEntire. And then I see an objection you filed Friday, Docket No. 3761. And then last night at 9:30 a supplemental support document. I take it none of --

MR. MCENTIRE: Right.

THE COURT: -- these issues raised the conflict of interest issue.

MR. MCENTIRE: We addressed the conflicts of issues in -- certainly in our filing last night. But the brief on Friday and the objection on Friday is addressing the Court's email and Mr. Morris's request to hold an evidentiary hearing. And we oppose that. We object to the conduct of an evidentiary hearing. And the brief that we filed -- the objection we filed was supported by case law. I've seen nothing from Mr. Morris or any of the other counsel in the case responding to our objection or the cases we've cited.

But Your Honor, if you wish, I could just move forward right now and address the evidentiary issue, if you wish.

THE COURT: All right. Well, I'm backing up. This shows 9:10 a.m. this morning, the 3761. Am I on the wrong thing?

MR. MCENTIRE: I think you're -- what we did this morning at Mr. Morris's request is we sent in a redline version of the revised complaint to the Court's attention. The actual revised complaint was filed last night, and all that was done this morning was, at Mr. Morris's request, to facilitate his review of the new complaint, was to redline it.

THE COURT: All right. Well, and then, okay, the brief you filed was at 4:55 p.m. Friday.

MR. MCENTIRE: Yes, ma'am.

THE COURT: I can assure you, we were still all working then, but unless you notify my courtroom deputy that you have filed something sort of on the eve of a hearing, we're not necessarily in chambers going to go back and scroll the docket. We had court on other matters this morning, so we were focused on that. I've not seen your brief. But anyway, you can argue obviously what you want to argue.

Okay. So let's talk about -- I think you wanted to talk about evidence first.

MR. MCENTIRE: Yes, ma'am.

THE COURT: So I'm happy to hear about that topic first. Because, obviously, the other issues -- length of hearing, date of hearing -- hinge on that. So what do you --

MR. MCENTIRE: I agree.

THE COURT: What do you say about this?

MR. MCENTIRE: All right. Well, earlier, I think, last week, or perhaps it was the end of the previous week, Mr. Morris had issued an email requesting a four-hour hearing because he wanted to cross-examine Mr. Dondero and otherwise have a full-blown evidentiary hearing. Opening statements, final argument, and witness examinations.

We responded immediately by email objecting to the evidentiary format. There was a series of exchanges between my office, Mr. Morris's office, and your chambers, Your Honor,

where Ms. Ellison indicated that you were initially inclined to grant an evidentiary hearing.

That was followed by an email on April 19th of last week where you suggested in your email that the issue of colorability, which is really the gatekeeper function that the Court's serving, as the Court is aware, that the standard for colorability was somehow greater than the standard for plausibility under a 12(b)(6) motion.

In the email, Ms. Ellison suggested that it was perhaps the Court's initial thinking that there was a higher hurdle associated with the gatekeeping function than a traditional 12(b)(6) inquiry.

We have done substantial research following that email exchange, and I will also point out to the Court we actually briefed the 12(b)(6) standard in our original emergency motion for leave. So this is not new to us. We had actually briefed it originally in our original motion that was filed back in late March. March 28th, I believe.

But in light of the Court's communication, we did further research. We have found no cases that suggest that the inquiry for colorability is greater than the plausibility standard under *Twombly*. In fact, we found cases that suggest just the opposite. The *Gonzalez* case which was cited is a Northern District of Texas case. It was a gatekeeper case. Not a bankruptcy case. But it was a gatekeeper case on an

ERISA claim that simply said that the plaintiff simply had to be able to establish an arguable claim.

The *Deepwater Horizon* case, which is a Fifth Circuit case, also states that the case -- the claim must only have some possible validity.

So the threshold inquiry is very, very low. Evidence is not allowed.

The *Gonzalez* case also suggested that the Court, similar to a 12(b)(6) inquiry, is limited to the four corners of the principal pleading -- in this case, the complaint, or now the revised complaint.

So we don't believe that --

THE COURT: So, Mr. McEntire, --

MR. MCENTIRE: Yes, Your Honor.

THE COURT: -- let me -- help me with this. I'm walking through -- because obviously the question we're drilling down on is what is the appropriate legal standard for the Court to apply --

MR. MCENTIRE: Yes.

THE COURT: -- in performing the gatekeeping function. So I started the same place I guess you and everyone else started, and that is with the plan, the gatekeeping provision in the plan. And it starts on the bottom of Page 50 and goes over to 51.

And you probably discovered, the same as I discovered,

that it doesn't give the appropriate legal standard. It just says that the Bankruptcy Court -- that no enjoined party may commence or pursue a claim or cause of action of any kind against any protected party without the Bankruptcy Court -- turn over to Page 51 -- first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind. And then the last sentence of that paragraph: "The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable."

Okay? So all that really tells us is that there has to be notice and a hearing. That doesn't say what kind of hearing, evidentiary or otherwise, and doesn't elaborate on colorable.

So, beyond that, here was my legal thinking. And maybe this is all fully explored in your brief. I just don't know. I thought, well, what legal standard do Bankruptcy Courts apply in the *Barton Doctrine* context when someone is seeking leave to sue a bankruptcy trustee? And then I thought, what legal standard do Bankruptcy Courts apply in a *Louisiana World Exposition*-type context if an unsecured creditors' committee or other party brings a *Louisiana World Exposition* motion, saying, we'd like leave to sue a party because the debtor-in-possession is conflicted or whatever reason.

And so before we get to *Deepwater Horizon* and the other cases, did you find any legal authority in the *Barton Doctrine*

context that you think sheds light? Because that seems to me the most analogous context, right?

MR. MCENTIRE: Specifically to answer -- to respond to your question directly, the answer is no. What we did find specifically, though, was the case, as I'd indicated, the Fifth Circuit directs that a 12(b)(6) standard be applied to the issue of colorability. And that's the *Trippodo* case.

THE COURT: The what case?

MR. MCENTIRE: And that's also cited -- the *Trippodo*. T-R-I-P-P-E-D-O [sic]. That is a Southern District of Texas case that cites a Fifth Circuit precedent that directs that a 12(b)(6) standard be used as a template, if you will, for determining colorability. And we've also cited that in our brief.

THE COURT: And that, was that the one that was in an ERISA context?

MR. MCENTIRE: No, ma'am. That was *Gonzalez*. And that's cited on Page 7 of our brief.

THE COURT: And so --

MR. MCENTIRE: That was a gatekeeper -- a gatekeeper issue. Before you -- you have to satisfy certain criteria before the Court will allow the ERISA to even be filed, the ERISA claim to even be filed. And so it was akin to a gatekeeper function. And they applied specifically a colorability or 12(b)(6) standard.

THE COURT: I'm sorry. What was the context? What was -- who was seeking to sue whom over what in the *Trippodo* case?

MR. MCENTIRE: The -- it was an ERISA claim. It was in the -- I believe it's the Northern --

THE COURT: Oh, I thought you said is not an ERISA claim.

MR. MCENTIRE: Well, no, I apologize. I may have sorted my words. It was an ERISA claim. It was in the Northern District of Texas, I believe. I have it right here. One second. Yes, it's Northern District of Texas. It's a 2002 case. It was dealing with the amendment of pleadings to bring forth an ERISA claim. And the issue there is whether or not there's a colorable claim or whether it was frivolous or futile. And the court determined that a -- that before you even get to the 12(b)(6) level -- this case can actually stand for the proposition that it's -- that it's even less than a 12(b)(6) standard. But before you even get there, you have to address it from a futility or frivolity or is there any evidence. The actual words that are used are, one second, "any arguable claim."

THE COURT: Okay.

MR. MCENTIRE: Not plausibility. Not on the merits. But any arguable claim. It's the lowest of possible thresholds.

THE COURT: All right. Well, --

MR. MCENTIRE: And that's --

THE COURT: -- so, but just to be clear, you didn't find anything in the *Barton Doctrine* context out there?

MR. MCENTIRE: I did not.

THE COURT: And what about --

MR. MCENTIRE: Now, to be honest --

THE COURT: Say again?

MR. MCENTIRE: To be clear, I did not -- I did not -- I apologize. We did not specifically look at *Barton*. I'll be glad to do that and supplement as necessary.

THE COURT: Okay. And *Louisiana World*, you didn't find anything that would shed light in that line of cases?

MR. MCENTIRE: I think we did. I believe *Louisiana World* supports our position here.

THE COURT: It says what legal standard applies?

MR. MCENTIRE: One second. One second, Your Honor, please.

(Counsel confer.)

MR. MCENTIRE: One moment, please, Your Honor.

(Counsel confer.)

MR. MCENTIRE: Can I -- I might have to supplement that. I have someone looking for it right this second.

(Counsel confer.)

MR. MCENTIRE: It was a conflict issue.

(Counsel confer.)

MR. MCENTIRE: The *Louisiana World* case, it was a little bit off topic. It had to do with a conflict of interest where the creditors' committee had a conflict on (inaudible) and the Court determined that the case should go forward. And --

THE COURT: I know it was a different context. I'm just trying to find something analogous to this gatekeeper motion. And the most analogous things I could think of was motions for leave that have been filed in a Bankruptcy Court pursuant to the *Barton Doctrine*, wanting to sue a bankruptcy trustee, where the Bankruptcy Court acts as a gatekeeper, and then a *Louisiana World*-type situation where a creditors' committee files a motion seeking leave to sue somebody, arguing the debtor is not doing it, for either conflicts or some other reason.

All right. So, assuming your case authority is the guiding authority here and it's a Rule 12(b)(6)-type context, you're saying I should look at the four corners of the documents, or anything else the Fifth Circuit has said I can look at, take judicial notice of, in a 12(b)(6) context and not hear evidence?

But part of the reason we're having this dispute, right, is because you've put forward some evidence? Do I understand that correctly? And I have not dove into weeds on this yet,

but I understand there were affidavits submitted by you. Correct?

MR. MCENTIRE: In order to make this determination, you do not need to consider the Dondero affidavits that Mr. Morris has raised. You do not need to consider any of the documents that are actually associated with our motion.

We recognize that the application under the 12(b)(6) standard, you'd be relegated to the four corners of the actual complaint itself -- in this case, the revised complaint.

The 12(b)(6) standard is a guide. We take that to mean that it's a low standard. It's, at most, a plausibility standard, but we believe actually less.

We've provided the Dondero declaration -- declarations, plural; there were two -- together with some documents to give -- provide additional background for the Court. But Mr. Morris has raised an objection. And under the circumstances, assuming the Court follows the guideline of the *Trippodo* case, then we would understand the Court would not consider the actual Dondero declarations.

THE COURT: Does that mean you're withdrawing the affidavits?

MR. MORRIS: I object to that, Your Honor. I really -- I'll let counsel finish. This is just not right.

THE COURT: Okay.

MR. MCENTIRE: Well, I'm not sure what --

THE COURT: Your response to that?

MR. MCENTIRE: I think what we're doing is the correct legal statement and articulation of what the law is. Whether Mr. Morris likes it or not, I suppose, you know, with all due deference to Mr. Morris, it's not a question of whether I'm doing something that he likes. It's what I think is legally correct. And I think that I've presented that as best as I can to the Court.

THE COURT: Okay. Well, you never --

MR. MCENTIRE: By the way, --

THE COURT: Assuming I would allow withdrawal of the affidavits, is that what you're seeking to do?

MR. MCENTIRE: Yes. If the Court is suggesting that if I leave the affidavits attached to the motion that the Court is going to allow this to become, effectively, a trial on the merits -- when it shouldn't be, because that's not what this is about, this is not a test of witness credibility, this is not a test of the ultimate merits of the claim -- if that is the situation that I'm being placed, then the answer is we would not want to withdraw them but we will.

THE COURT: Okay. Well, you don't want to but you will? I mean, I --

MR. MCENTIRE: Yes, correct. We do.

THE COURT: I feel like that means I need to explore this a little, because I don't want -- well, any time

affidavits are put forward in this Court, or I think any other court I know of, parties are always given the chance to cross-examine an affiant or a declarant. Okay? We always allow that if there's an objection to the underlying motion. So, --

MR. MCENTIRE: Well, here, --

THE COURT: -- I just want to make sure you're clear, you put it in and then the other side said, well, we want a chance to cross-examine the affiant. I allow that --

MR. MCENTIRE: Then --

THE COURT: -- always, a hundred percent, as does every other judge I know. If there's an affidavit, if someone wants to cross-examine them, obviously, there might be two sides of the story. So I just want to be clear on what your desired outcome is --

MR. MCENTIRE: Fair enough. I understand.

THE COURT: -- and request is.

MR. MCENTIRE: I understand the Court's statement. We withdraw the Dondero affidavits for purposes of this exercise and your consideration.

THE COURT: Okay.

MR. MORRIS: Can I be heard, Your Honor?

THE COURT: Yes. I'm going to let you be heard on that. But any other argument you want to make, Mr. McEntire?

MR. MCENTIRE: Yes. One last thing. We did find the reference to *Louisiana World*, and it was determined that no

evidence was appropriate and that the court should limit its inquiry based upon the allegations in the pleading, and in that case, to determine whether it was a colorable claim, which would, if pursued successfully, could have increased the value of the estate. So, the *Louisiana World* case does suggest that there's not an evidentiary component to this inquiry.

THE COURT: Okay. Let me be clear. You first said it held no evidence was appropriate, and then you said suggest. So, did the court actually tackle what is the legal standard and is evidence appropriate? Did it actually tackle those specific issues? That's all I really care about. Because I've read the case.

MR. MCENTIRE: Yes. The citation in our brief is that the Court need not be satisfied that there's an evidentiary basis on the merits of the claim to be asserted. And we have cited the *Louisiana World* case at Pages 252 and 253. Allegations were sufficient and no evidentiary hearing was necessary to determine -- in this case it was a breach of fiduciary duty claim -- whether it had -- whether it was appropriately colorable to move forward.

THE COURT: Okay. Courtney, you can be drilling down on that.

All right. Anything else?

MR. MCENTIRE: On the evidence issue, no, Your Honor.

We would, again, if the Court has time, we would encourage the Court to read our brief. We believe we've laid out the law fairly succinctly and clearly, and we stand by our brief --

THE COURT: All right.

MR. MCENTIRE: -- and our objection.

THE COURT: Well, of course I have time and I will read it, but I just, given when it was filed and that I wasn't alerted to it being there, I'm just explaining why I have not read it yet.

All right. Mr. Morris, your argument?

MR. MORRIS: Good afternoon, Your Honor. John Morris for the Claimant Trust and for the Reorganized Debtor.

Your Honor, we understood this to be a status conference. We didn't understand this to be a day for rulings by the Court. We didn't understand there was an issue for the Court to determine today. Hunter Mountain has now filed two briefs on the topic of the standard of colorability, and they've made an exhaustive argument, doing all of this before we -- before any of the objecting parties have had an opportunity to be heard.

Our brief is due on May 4th, and we respectfully request that the Court, subject to other comments that I have this afternoon, withhold judgment on anything that's happened here today.

Mr. McEntire has completely misstated the law. He has no

understanding, apparently, of what a gatekeeper is and how it functions under *Barton*. And there's been no reference at all to the purpose of the gatekeeper, which is set forth explicitly, clearly, and in great detail in the Court's confirmation order. Okay?

12(b)(6), I don't want to -- I don't want to get too far ahead of myself, but 12(b)(6) has nothing to do with this case. Of course this has turned into a bit of a circus, Your Honor, as it always does in Highland. This was a very simple matter. Hunter Mountain filed a motion for leave to file a complaint under the gatekeeper provision of Highland's plan. They attached a copy of their proposed complaint. And Paragraph 1 of their motion says, The motion is separately supported by the declarations of James Dondero dated May 22nd -- May 2022 and February 2023.

And these aren't just two declarations, Your Honor. There's almost 400 pages of attachments to these declarations. And now, 10 days before our opposition is due, because Mr. Dondero fears being cross-examined, Hunter Mountain just willy-nilly thinks they can withdraw those affidavit and declarations? That is greatly prejudicial, and I just can't believe what I just heard.

They don't want to do it, they don't want to subject their client to some cross-examination, when they put their declarations into evidence, when they said that their motion

was based on these declarations.

We should have that opportunity, Your Honor. Forget about the standard. As Your Honor rightly pointed, the rule is very clear. You offer declarations; we get to cross-examine.

On Friday night, we got Hunter Mountain's objection. Their, really, their second attempt to deal with colorability. Last night, they filed what they characterize as support or a supplemental document, which Hunter Mountain insists is not an amendment of their pleading.

Your Honor, I've had Hunter Mountain provide the Court with a blackline. I would respectfully request that the Court instruct Hunter Mountain to file it on the docket so that it becomes part of the official record in this case. If Your Honor reviews the blackline version, which is not on the docket but was emailed earlier today at my request, the Court will see just how extensive the changes are to this pleading. So here they are, without leave of Court, without filing a motion to amend, without anything, they simply dump a brand new complaint on us 10 days before our opposition is due, and today tell us they're not going to include the Dondero declarations.

This is all terribly wrong, Your Honor. This is not the way the process is supposed to work. I've seen a lot in this case, but this is a new standard for chaos.

The changes are extensive. And I just want to point out a

couple of them. They now claim that Mr. Seery exercised "despotic control" over the Debtor. I believe I have the right to inquire as to the factual basis for that ridiculous allegation.

They allege in Paragraph 2 of the newly-amended complaint that Seery "failed to cause the Debtor to make financial disclosures, as required."

Your Honor has been in this case since December of 2019. As this Court is aware, the single only financial disclosure that was not filed with the Court was pursuant to Rule 2015.3. Mr. Dondero commissioned his investigation. As his declarations say, he caused Mr. Rukavina and Mr. Draper to complain to the U.S. Trustee's Office. Nothing.

They objected to confirmation. They made a motion. They went to the District Court. They went to the Fifth Circuit. That one single document is not a basis to say that Mr. Seery failed to cause the Debtor to make financial disclosures.

We have the right, Your Honor, under the -- under the gatekeeper, under this Court's confirmed plan -- which, by the way, is worth nothing that in their newly-amended proposed complaint they specifically say they do not challenge the confirmation order. And I would encourage the Court to look at Paragraphs 77 through 80. They don't challenge that order. And that order tells us that we have the ability to inquire as to the good faith nature of these allegations. It has nothing

to do with 12(b)(6).

Because these changes are so extensive, Your Honor, we think we need a further change to the schedule. We believe the law says that this is an amendment that requires a resetting of the clock. But we don't need that much time, Your Honor. We need just a brief adjustment to the schedule. And we specifically propose that the objection deadline be extended by one week, from May 4th to May 11th. The reply deadline should be extended by one week, from May 11th to May 18th. And the hearing date should be extended by one week, from May 18th to May 25th, or any day the following week after Memorial Day.

The objecting parties should not be prejudiced by Hunter Mountain's continued evolution of their claims. This is -- and this approach is completely fair and reasonable.

And we want to touch just for a moment on this concept of derivative standing. Again, Your Honor, we plan on addressing this in detail in our submission. We shouldn't be required to set forth all of our arguments before they're fully formulated, pursuant to the Court's scheduling order. But I do want to make a couple of points.

Another attorney representing Hunter Mountain filed what it called the valuation motion. The first iteration, Your Honor will recall, was actually filed by Doug Draper on behalf of Dugaboy last summer. Then Louis Phillips represented

Hunter Mountain. When that motion was denied, the Stinson firm came in and represented Hunter Mountain. They filed a new valuation motion.

Here's the irony, Your Honor. Mr. Dondero and Hunter Mountain and Dugaboy keep telling the Court assets exceed liabilities. Assets exceed liabilities. And you know our position on that, Your Honor. They may; they may not. It's also irrelevant at the end of the day because of the indemnification claims. And we'll talk about that more in a moment.

But the important thing is that, if assets exceed liabilities, how could anybody other than, according to Hunter Mountain, Hunter Mountain have been harmed by anything? Creditors, according to Mr. Dondero, are getting paid in full. How could any of these allegations have harmed any beneficial holder of an interest in the Claimant Trust today? According to Mr. Dondero, they're going to get paid a hundred cents on the dollar. Where's the damages?

There's no derivative claim here. This is a -- this is an action by and for Hunter Mountain and nobody else. And it's frivolous. And we will prove that.

Make no mistake. The Trust and the Reorganized Debtor has a substantial outcome in this motion, and that's why I'm here. I'm here because the Trust has substantial indemnification obligations. Mr. Dondero seems to forget that. But those

indemnification obligations are real, and the Trust and the Reorganized Debtor have an affirmative duty on behalf of the Claimant Trust beneficiaries to make sure that baseless litigation is nipped in the bud. And that's why I'm here.

There is no rule of law that says you let the fox into the henhouse simply because the fox fabricates a story that the henhouse is on fire. The henhouse is not on fire, and an evidentiary hearing will prove that.

As for the subject at hand, it's important to remember that the underlying motion is not a defendant's motion to dismiss, but rather it's Hunter Mountain's motion for leave to file a complaint under the gatekeeper. The burden has shifted. They have the burden, not the putative defendants, but Hunter Mountain.

The gatekeeper provision was contained in Highland's plan, it was confirmed by this Court, and it was confirmed -- it was affirmed by the Fifth Circuit Court of Appeals.

We appreciate the Court's preliminary view that an evidentiary hearing is appropriate here, and we understand why there's two reasons for that: Because they put declarations into the record; and more importantly, because the gatekeeper provision requires it.

Hunter Mountain's objection to an evidentiary hearing is disingenuous. Mr. Patrick, Mr. Dondero, Hunter Mountain, they all know the gatekeeper analysis is not a 12(b)(6) analysis,

for at least the following reasons. Mr. Dondero and his affiliates have been fighting the gatekeeper provision since the moment it was proposed. They fought it at confirmation, they appealed it to the Fifth Circuit, they objected when this Court entered an order approving the gatekeeper without modification, in conformity with the Fifth Circuit's decision, and then going back to the Fifth Circuit to challenge the gatekeeper.

Why would you do all of that? Why would you spend that money? Why would you exhaust every potential avenue? If you thought it meant nothing, if you thought it was a less standard than 12(b)(6), who would do that? I think their conduct proves that they know the standard is substantially higher. And if they only read the Court's confirmation order, they would know that for certain.

Hunter Mountain's own pleadings prove that they know this is not a 12(b)(6) standard. If they thought it was a 12(b)(6) standard, they wouldn't have specifically and expressly asked the Court to look beyond the four corners of the complaint. Right? That's what they did in Paragraph 1 of their motion, the very first document filed here, Docket No. 3699, Paragraph 1: The motion is supported by the declarations of Jim Dondero.

Why would you do that if you thought all the Court had to do was look at the four corners? They'll never be able to

rationally explain that. They're attempting to, and I hope the Court won't let them, they're attempting to withdraw the declarations today because they found out afterwards that when you put declarations into the record people are allowed to cross-examine.

The Court should not allow Hunter Mountain to play these games.

There's more. They know they don't have the goods here. How do you know they don't have the goods here? Because the facts are based on Mr. Dondero and Mr. Dondero alone. This email that he sent to Mr. Seery in December 2017, as well as this phone call or phone calls that he allegedly had with one or two representatives of Farallon. This is all Mr. Dondero. He had all of this information in the spring of 2021. Did he bring anything to this Court's attention? No. You know what he did? He sought discovery. And he filed a 202 petition in Texas state court.

If you have the goods, if you have the evidence, bring your claim. He didn't do that because he knew he didn't have the evidence. He knew he didn't have the goods. So they went fishing. They went fishing to state -- Texas state court, and they came up with nothing. Right? It was removed to this Court.

Your Honor will recall that in early 2022 Your Honor had a hearing and remanded it back to state court. Mr. Dondero

filed another declaration with another version of his phone call with Farallon. And Texas state court dismissed the petition.

Hunter Mountain waits seven months. I don't know why they wait seven months, but they wait seven months. They have the same evidence. They don't file a complaint. Instead, Hunter Mountain files another 202 petition, searching for evidence. They went fishing again, and again went home empty, with Mr. Dondero's third recitation of his conversation with Farallon, but a second and different Texas state court said, no dice, no discovery.

That's why they're here now, because they swung and they missed twice. They have no better evidence today than they did in the spring of 2001 [sic] when a decision was made that they didn't have enough to bring an action. They know 12(b)(6) is not the standard here, Your Honor.

Mr. Stancil is here today on behalf of Mr. Seery. I understand Mr. Stancil wants to introduce himself to the Court and provide some very preliminary views on the gatekeeper standard and related matters. Highland -- Holland & Knight is here on behalf of the Claim Purchasers, and I'm sure they'll want to weigh in.

In the end, Your Honor, this was supposed to be a status conference. There's nothing for the Court to decide. A scheduling order was in place, and we'd respectfully request

that it be adjusted in light of, you know, these amended pleadings. I don't know why they -- you know, their amended pleadings. Just look at the blackline.

We should have the allotted time to respond to these issues, and we will do so. And I'm very confident that at the completion of briefing the Court will find it not only appropriate but necessary to hear evidence on this motion.

That's all I have, Your Honor.

THE COURT: All right. Let me be clear. The redline, should I have it somehow? It was not filed on the docket. You're wanting --

MR. MORRIS: It was not, Your Honor, --

THE COURT: Okay.

MR. MORRIS: -- just to be clear. I think -- I brought to Mr. McEntire's attention this morning that the Court's prior instruction in this case was that when you were going to file amended documents, when you were going to use amended documents, that blacklines should be filed with the Court. And a blackline was sent I believe to Ms. Ellison and to all counsel of record, but it wasn't filed on the docket. And I respectfully request that it be put on the docket, because I think that needs to be part of the record of this case.

THE COURT: Okay. I just -- I got from Traci the redline.

MR. MORRIS: Yeah. Just open it up. You'll see.

THE COURT: It was not sent to her until 12:00 noon, and then she sent it to me at 1:00-something. So I've got it now. All right. There it is. It's 43 pages.

MR. MCENTIRE: Your Honor? May I respond very quickly to the --

MR. MORRIS: No. Your Honor? Your Honor?

THE COURT: I'll let you have rebuttal argument at the end, --

MR. MCENTIRE: Fair enough.

THE COURT: -- after I've heard from all of the other parties in interest.

So, who wants to go next? Mr. McIlwain or counsel for Mr. Seery, Mr. Stancil? Who wants to go next?

MR. STANCIL: Your Honor, I think it's -- well, this is Mark Stancil for Mr. Seery. I think it's my turn.

THE COURT: Okay.

MR. STANCIL: And I'll try to be brief, Your Honor. I think it'd be helpful mostly to explain just in a little bit of detail why we agree completely with Mr. Morris's statement that Your Honor should await full briefing on this issue. Just in response to certain of the comments made earlier by the Plaintiffs, I'd like to just sort of maybe level-set a little bit.

For starters, I was confused that Mr. McEntire said he did

not look for cases under *Barton*, because Your Honor specifically cited *Barton* in the confirmation order in approving the gatekeeper provision, which I believe it's in Paragraph 80 in the confirmation order on Page 58. That's Docket No. 1943. And Your Honor specifically cites the Supreme Court's *Barton Doctrine*.

Moreover, that followed recitation of the extensive factual findings that supported the requirement of a rigorous gatekeeping requirement, including Paragraph 77, which the Court found as fact that Mr. Dondero and the Dondero-related entities have harassed the Debtor, which has resulted in further substantial, costly, and time-consuming litigation for the Debtor.

And as particularly relevant here, the Court further found that this harassment had been specifically directed at Mr. Seery, among others.

The Court further found in Paragraph 78 that Mr. Dondero's abuse of litigation "was consistent with his comments as set forth in Mr. Seery's credible testimony that if Mr. Dondero's plan proposal was not accepted he would 'burn down the place.'"

So, accordingly, Your Honor, the reference to *Barton* is very much a robust gatekeeping entity -- requirement. And we're exactly today where the Court had predicted in entering this order, that the costs and distraction of this litigation

are substantial. And if all we're doing is replicating a 12(b)(6) hearing on a motion for leave, we're actually not doing anything to reduce, as the Court made clear, the burdens, distractions, of litigation.

The Fifth Circuit likewise cited *Barton* in its order affirming the confirmation order. Specifically, it also explained that the provisions, these gatekeeper provisions requiring advance approval were meant to "screen and prevent bad-faith litigation." Well, that -- if that means only what the Plaintiffs say it does, then it really doesn't do anything at all to screen. There's no gatekeeping because their version of what that means is always policed under 12(b)(6) standards.

Moreover, the essence of bad faith is saying things in a complaint that are not true and are easily proved to be false. You know, the irony of their position is if you lard a complaint up with absolute falsehoods and lies, well, those have to be taken as true, and so, you know, they'll survive the motion to dismiss, and so therefore we can file it. That would turn the bad faith essence of the gatekeeping provisions here on their head.

So we think this is all about *Barton* and its progeny. But I would also provide Your Honor with maybe a 30-second preview of why we think *Barton* does have clear support for evidentiary hearings.

We -- I will refer Your Honor to a recent decision of the Fifth Circuit in a case *In re Foster*, 2023 WL 20872. And that was from January of this year, in which the Fifth Circuit affirmed a determination that a post-effective-date litigation could not be brought against the trustee. It's got a little bit of a complicated history, but I would -- I'll summarize to say the suit was filed in the state court, removed to federal court, and then there was a bankruptcy hearing, evidentiary hearing, and ultimately the Bankruptcy Court's decision was affirmed.

And we know there's an evidentiary hearing because if we look at the District Court's appeal opinion in that case, 2022 WL 160240 at *3, it specifically notes an evidentiary hearing because they had put a factual question before the Court.

But as a further preview to a brief that you'll be receiving from us, I think our count is up to nine circuits that apply an abuse of discretion standard to reviews of determinations under *Barton*. And of course, an abuse of discretion standard on appeal makes no sense if one is applying a mere 12(b)(6) standard, which, of course, is *de novo*.

One brief word on *Louisiana World*, Your Honor, because I believe the analogy they were drawing there is akin to a creditors' committee standing analysis. We're not at all agreeing that that level of analysis is appropriate here, but

I would add just a couple of things about that case.

First of all, that's a pre-effective-date question of a committee's standing to bring a cause of action. This, we're talking about repeated findings of abuse of process, giving rise to a gatekeeper action that applies beyond the effective date.

But that aside for the moment, even in the creditors' committee context, those creditors also have to show that the underlying action is both colorable and also that the party that didn't bring it was unjustified. So the Court looks beyond the mere 12(b)(6) standard in that context.

And I would just flatly disagree with Mr. McEntire's characterization of that decision as saying that evidence is not required. If Your Honor looks at Footnote 15 in that decision, which is at Page 248, so we're at 858 F.2d 233 at 248, the court explained why "an evidentiary hearing was unnecessary under the circumstances." And the circumstances the court goes on to note are that the officers and directors "did not object at any time to the committee's application" and further found that the committee had demonstrated the existence of a potential cause of action, and the officers and directors neither refuted any of the committee's claims nor objected to them. "Under the circumstances, we are at a loss to understand just what could have been gained from an evidentiary hearing on an application which drew no

objections."

So, respectfully, Your Honor, I don't think that case could possibly stand for a blanket rule that evidence is not appropriate in support of this, this -- even that analysis.

I think, Your Honor, the most important thing I'd like to ask for is the opportunity, as Mr. Morris mentioned, to write all this down for you instead of reading case snippets for you. We're in the middle of writing our brief. And it has changed quite a bit. We think the brief will be very helpful.

I would add, moreover, that there's no harm to be had by having an evidentiary hearing. If after full briefing Your Honor were to decide, you know what, this is a 12(b)(6) standard -- we don't think you will; we think it's actually a slam dunk to the contrary -- but the Court can, like in many bench trials, decline to rely on evidence and just say, hey, I'm not going to look at that, and here's -- here's where we go. But at least then the hearing will be -- we'll have it, and we'll have the record.

More importantly, we actually think there's enormous value in getting this right, as the Court of Appeals has told us getting it right under *Barton* and applying the correct scrutiny is required.

So, unless the Court has questions, I can turn it back to Mr. Morris or to Mr. McIlwain.

THE COURT: All right. I don't think I have

questions at the moment of you, but I'll turn to Mr. McIlwain and see if I have any questions for the collective group at that point. And of course, I'll go back to Mr. McEntire as well.

All right. Mr. McIlwain, go ahead.

MR. MCILWAIN: Thank you, Your Honor. Brent McIlwain here, again, from Holland & Knight for the Claim Purchasers. Your Honor, I'll be brief and just echo what Mr. Stancil and Mr. Morris said.

I guess, from a practical standpoint, though, what I'm most concerned about here is the procedure by which we've gotten to where we've gotten. It started with a motion for leave to file this complaint on what was supposed to be three days' notice. The Court denied that, rightly. That was appealed, and then there was a *mandamus* to the Fifth Circuit, all -- all of which were denied.

Here we are on the eve of this status conference, objections are filed, new pleadings are filed. I think what's being demonstrated is precisely why this Court has a gatekeeper order in place. Mr. Dondero and his counsel are vexatious litigators, and they're looking for any opportunity to get a leg up on us. On anybody in their path, frankly. And the Court should give us a reasonable opportunity to brief this, should give us a reasonable opportunity to present our case, and we should know what we're fighting against. Are we

fighting against a motion for leave that's supported by affidavit or not? And if we're not, they need to file a new motion or strike the affidavits on the record.

We can't have this ever-evolving pushing against a rope to determine what exactly we're fighting against. And the Court, the Court and the parties who are the subject, frankly, of what are fantastical make-believe theories from Mr. Dondero are entitled to know what the story is. And we're entitled to know what the pleading is. And if the pleading is -- as soon as the pleading is set, then we can respond.

So we're here to ask the Court, if we want to set a hearing, let's close the pleadings as it relates to Hunter Mountain. They shouldn't be even filing any further. Because if they're going to file something further, we need more time. And I'm okay with the schedule that Mr. Morris has outlined, but, frankly, it's generous to Hunter Mountain.

Anyway, Your Honor, I don't have anything substantively to add, but we will include a comprehensive response in our responsive brief whenever that filing, whenever we can determine exactly what we're responding to.

Thank you, ma'am.

THE COURT: All right. Mr. McEntire, you're the Movant, you have the last word.

MR. MCENTIRE: Yes, ma'am. Thank you. I'll try to be brief here.

Mr. Morris says -- I wrote down his words -- if you have the evidence, bring the claim. The revised --

THE COURT: I'm sorry, I did not -- I didn't hear what you said. Could you repeat what you just said?

MR. MCENTIRE: Yes, ma'am. Mr. Morris just told the Court that if they have the evidence, bring the claim. We have the evidence. And all you need to do is to look at the four corners of the revised claim that is before you. And you do not need to look at the Dondero declarations.

THE COURT: Let me --

MR. MCENTIRE: And we withdraw the Dondero --

THE COURT: Let me -- can I stop you right there? I mean, --

MR. MCENTIRE: Yes.

THE COURT: -- the point was made by I forget which lawyer now that your original motion for leave attached something like 387 pages of not just Dondero affidavits, but other evidentiary support. So I'd just like you to respond to that.

MR. MCENTIRE: Sure.

THE COURT: Why did you initially out of the gate think the Court needed to consider 387 pages of attachments? And --

MR. MCENTIRE: We never saw this, Your Honor, we never saw this as an evidentiary inquiry.

THE COURT: But --

MR. MCENTIRE: That was simply background for the Court. The allegations themselves can --

THE COURT: But stop. Why would you -- call it background, evidence, whatever you want to call it -- why would you submit all of that if you think I just need to look at the four corners and apply a 12(b)(6) standard?

MR. MCENTIRE: I would suggest -- fair enough. I would suggest that probably 80 to 90 percent if not more of those documents are from the Court's docket. They are simply docket references in the Court's docket. Very little is outside the four corners of the proceedings that you've been administering, Your Honor.

They're also referenced in the four corners of our pleading. The allegations are set forth in the four corners of our pleading. You don't need to go to the docket -- you may, if you wish -- but you don't need to go to the docket to look at those documents, because the allegations speak for themselves.

And the revised complaint that is before you or that was with our motion -- and by the way, responding to one of other counsel's statements, I don't have to seek leave to amend a complaint that has not been filed yet. What we're seeking to do is we're seeking to bring forth to the Court a complaint for your consideration as to whether we state a colorable

claim. And we don't need Mr. Dondero's declarations, and we don't -- you don't need to go look at all those documents. You can look at the four corners of our complaint and make that decision.

And to -- so we -- Mr. Morris's invitation is we have the evidence, bring the claim. That's exactly what we're doing. Because if you review the claim, much of which is financial in nature -- and by the way, the -- with all due deference to Mr. Morris, I've heard the name Mr. Dondero probably 50 times during this hearing. And we don't need Mr. Dondero to support the four corners of this complaint. And if you look at the complaint itself, there's no reference to Mr. Dondero -- or if there is, it's very few -- in the complaint itself. And this is -- Mr. Dondero is not bringing this particular motion. This is a motion by Hunter Mountain. Mr. Dondero is not directing the filing of this motion. This is a motion filed on behalf of Dondero and -- excuse me, on behalf of Hunter Mountain, and hopefully on behalf of the Reorganized Debtor and the Claimant Trust.

And so when we hear Mr. Dondero, it's an attempt to distract the Court. And what we need to do is just take a step back, not have distractions, look at the complaint, and under a 12(b)(6) standard, which is the appropriate standard at most, I think the Court will find that we have stated far more than a colorable claim.

I will also point out that Mr. Morris has not identified one single case suggesting or supporting his position. Not one single case. And counsel for Mr. Seery has really not addressed the *Louisiana* case that we've identified in an effective way.

THE COURT: He said -- he said --

MR. MCENTIRE: If he wants additional --

THE COURT: He said that was in a pre-confirmation context, and he pointed out the recent *Foster* case. What is your response to the recent *Foster* case?

MR. MCENTIRE: The issue here is colorability. And I don't have the recent *Foster* case before me. The issue is colorability. There's nothing in the Court's gatekeeping protocols in the plan that changes the standard. The standard is the same as the Fifth Circuit has articulated, and that is to -- that it's not a fruitless claim, --

THE COURT: But the question is, --

MR. MCENTIRE: -- that there's some evidence.

THE COURT: The question is whether the hearing that is required by the plan -- which said the Bankruptcy Court, after notice and a hearing, will determine whether an action should go forward -- whether the hearing contemplates evidence. Does the Court need to hear evidence? And to me, that partly turns on what my legal standard is.

In *Foster Mortgage*, --

MR. MCENTIRE: Yes.

THE COURT: -- the court heard evidence. And it was a *Barton* motion, which, as I identified, I think is a pretty darn analogous situation.

And I'll just let you know, my law clerk found a case from the Third Circuit, *Barton Creek*, where they considered evidence. *Vistacare Group*, 678 F.3d 218 (3rd Cir. 2012).

So, again, I am just here to figure out what kind of hearing we set. And maybe --

MR. MCENTIRE: That --

THE COURT: Maybe it's just -- maybe it's premature. Maybe I can't make that decision today because I have apparently very different views on whether evidence is appropriate and what my legal standard is. Maybe we need to just hear the briefing --

MR. MCENTIRE: We will take a look at the *Foster* case, Your Honor. And, as appropriate, I will -- we'll provide counsel our views on that. He's raised the issue, and we would like to be able to respond.

With regard to the schedule, I would suggest to the Court that the schedule as it exists is appropriate and sufficient because there's more than 24 or 25 days to respond to this pleading. And -- number one. Number two, regardless of how Mr. Morris liked to characterize the redline or the blackline or whatever-line, the bottom line is the pleading has actually

been streamlined. We've actually dropped a claim. We dropped one of the causes of action. And what has been included --

THE COURT: Which one was dropped?

MR. MCENTIRE: -- is the fraud that --

THE COURT: Which one was dropped?

MR. MCENTIRE: Fraud. We dropped fraud. We reorganized the pleading with a very large introductory section. And so what appears to be a lot of redline is a lot of just procedural reorientation of the pleading.

And the other thing I would point out, we have asserted a fraudulent concealment discovery rule allegation, and we have enhanced our conflict allegations against Mr. Seery.

We have also taken advantage of the financial data that just came out last week and incorporated some of that.

So a lot of this has occurred and a lot of our changes to the pleading have occurred or additions have occurred since the filing of the original motion. And so we don't believe there's -- the substantive nature of our allegations have not changed. We have added one or two additional declaratory judgment actions, and that's it.

And so setting aside attempts to mischaracterize expediently what may or may not be, I simply ask the Court to look at what's before it and to try to kind of pierce through the argument and perhaps a misdirection. Because, very clearly, the case has actually been lessened and is more

streamlined than anything.

With that, Your Honor, I would simply go back and say this. I don't believe we need to extend the briefing deadline any further. Mr. Dondero is not necessary for this Court's inquiry to determine what the appropriate standard is and whether evidence is required. We believe we are correct. We will brief the *Foster* case and take a look at it since counsel has raised it.

And I would, again, underscore the fact that Mr. Morris came in here today, talked for 30 minutes, and didn't offer the Court one single case citation.

Thank you.

THE COURT: All right. Well, he did start out by saying he didn't think we were going to discuss legal authority today.

MR. STANCIL: Your Honor, I don't want to reopen the wound, but if Your Honor wants cases, I've got -- I think I'm -- I have nine I could cite at the moment for the standard of review under *Barton*. It is not a 12(b)(6) standard. I assume Your Honor will ask if she wants those today or just wants to get those in our brief.

THE COURT: I want to --

MR. STANCIL: But I would hate for the record --

THE COURT: I want to get briefs. And in thinking through what kind of mini-scheduling order we're going to

have, I'm going to think out loud a bit. I will just tell you, I feel like this is -- deciding what is a colorable claim, I just strongly am inclined to think it's a mixed question of fact and law. Okay? And I am strongly inclined to think the Court's best guidance is from the *Barton Doctrine* cases.

And, again, I remember that *Foster* case from January. It's been three months since I've read it and I can't remember if they talked about legal standard or what kind of hearing you have to any great extent. But I do know the Court in Fort Worth heard evidence on that.

And, again, this Third Circuit case, *Vistacare* -- hang on. The court, just in Footnote 12, the Third Circuit points out evidence was presented and considered.

So I tend to think those are the most analogous cases, the *Barton Doctrine* cases. So I am going to allow briefing on (a) is it appropriate for the Court to hear evidence, and (b) any authority you can find regarding what is the appropriate legal standard. Colorable. I mean, those are actually closely overlapping issues, right? I guess they're one and the same, right? Because plausible, Rule 12(b)(6), you usually stick within the four corners of the documents, although you can take judicial notice of pleadings and the record in the case. But it looks like most of these *Barton Doctrine* cases have allowed evidence, suggesting it's at least a different

standard than 12(b)(6).

So I'm going to allow briefing on that, and we're going to talk about dates. But I'm just, I'm trying to decide -- and maybe I should get your comments on this, actually -- should we have legal briefing on other issues besides just what does the colorability standard entail.

Because here are a couple of things that just kind of make me wonder, do we need an evidentiary hearing or not? Do we have a legal question here about is all of this -- is this complaint, the claims in the complaint, would these be administrative expense claims that should have been asserted a long time ago? Does anyone want to talk about that? I mean, maybe I'm getting way ahead of myself. But the whole idea of Hunter Mountain is bringing these derivatively on behalf of the Reorganized Debtor. Well, maybe that negates my theory. I don't know. But I just think is this something -- maybe I'm all off. Maybe you all have thought about this a little more.

MR. MORRIS: Your Honor, yeah, if I may.

THE COURT: Okay.

MR. MORRIS: Number one, I hope whatever schedule the Court decides upon, that we stick to the schedule and that we don't have random briefs getting filed.

At this point, Your Honor, whether it's May 4th or May 11th, I think the objecting parties are going to address the two issues that you've identified, whether or not this should

be an evidentiary hearing and the standard of colorability. I'm also quite confident that other legal issues will be addressed, including whether or not Hunter Mountain has a legal right to even assert a derivative claim, whether or not duties are owed that would support some of these causes of action.

So there are other legal issues that we plan to address. But I would respectfully request that, whether it's May 4th or May 11th, you allow the objecting parties to file their papers, and then whether it's May 11th or May 18th, Hunter Mountain gets one and only one chance to respond in their reply. That's what the scheduling order is intended to do.

And I heard Mr. McEntire refer to yet another so-called supplement, and I don't want to chase a new brief every two days. That's not the way the process --

THE COURT: Well, --

MR. MORRIS: -- is intended to work.

THE COURT: -- absolutely. We're going to have --

MR. MORRIS: And -- and --

THE COURT: -- a firm scheduling order. But what I was thinking out loud about was would I hear or consider, entertain briefing on any subject besides the legal standard and do we have evidence. Because there are a couple legal issues out there swirling around. I don't know if my administrative expense argument/concern even makes sense,

because I'm not sure who's saying who was harmed here. But maybe it just doesn't make sense.

But another thing swirling around is do we have essentially complaints about claims trading? Claims trading? And I don't know if we want to get into that or not, but claims trading in bankruptcy is a pretty unregulated -- it's just kind of between the claims trader and the transferee. And so as far as do we have a colorable claims here, I'm wondering if there's some legal briefing with regard to the nature of the claims.

Thoughts?

MR. MORRIS: Well, --

THE COURT: Do we want to keep this solely legal standard and evidence, or allow briefing of a broader nature? I'm trying to be clear up front because I don't want one party giving me a huge brief going into 14 issues if that's not what --

MR. MORRIS: Yeah. And I would only say, Your Honor, that this motion is, in certain respects, no different than any other motion. A party files a motion, people are allowed to object, there's a reply, and there's a hearing. And we don't want that process to change one bit.

We think that there's a legal issue. If any objecting party believes that there's a legal issue that they feel like bringing to the Court's attention, it'll be contained in the

opposition brief. If Hunter Mountain wants to reply to that, they may. If they don't, they don't.

We have a schedule. You know, we'll just ask you for a one-week adjustment to take into account the latest pleadings that have been filed. But otherwise, this is a motion, there's an opposition, there's a reply, and there's a hearing. And we really would prefer to just keep it that way.

MR. MCENTIRE: Well, I agree with Mr. Morris, Judge, at least on the issue of the sequencing of the objection and the reply.

We still believe that May 4th is an appropriate date and we ought to keep the original schedule as they requested because of the nature of the pleadings that are before the Court, as I mentioned.

THE COURT: All right. Well, I've been scrolling through the redline. I see a lot of red. I know you say some of it's just rearranged, but I see a lot of red. So I think their request for a little more time is appropriate.

So, May 11th for objections and any briefs in support of objections. May 18th for a reply of Hunter Mountain and any briefing in support of the reply. And then a hearing May 25th or thereafter. Speak up, anyone who disagrees with this scheduling.

MR. MCENTIRE: Our statement, I just note it for the record, Your Honor.

So, with regard to the evidentiary issue, obviously, if the Court determines that it's going to be an evidentiary hearing, which we object to and oppose, I would reserve the opportunity to revisit the issue of withdrawing Mr. Dondero's declarations.

I will tell the Court, we're prepared to do so if this is not an evidentiary hearing, and we do not believe it should be an evidentiary hearing.

THE COURT: All right.

MR. MCENTIRE: I believe -- I think my position --

THE COURT: Wait. I'm hearing argument again. Right now, I'm just talking about dates.

MR. MCENTIRE: Understood.

THE COURT: And May 25th or as soon thereafter as you can be heard. Any opposition to that? I mean, basically, I'm just asking you to speak up, Mr. Morris's suggestion of these new dates: Anything you want to say about that?

MR. MCENTIRE: I do believe that my corporate representative is going to be unavailable on May 25th, and so we would ask that we keep the original schedule.

MR. MORRIS: Your Honor, I would propose, as an alternative to the 25th, since the 26th is the Friday before Memorial Day weekend, either the 30th, the 31st, or June 1st, with the 31st and the 1st being ideal, so we don't have to travel on the holiday weekend. I don't know what other folks'

schedules look like, but --

THE COURT: Okay.

MR. MORRIS: -- that seems to make sense to me.

THE COURT: What about May 31st or June 1st? And Traci, please let me know if I'm offering something I can't.

THE CLERK: Judge Jernigan, will you be giving a full day for the hearing? If so, neither one of those dates work. You could do the day after Memorial Day, May 30th. Or Friday of that week, May 2nd. I'm sorry, June 2nd.

MR. MORRIS: I'd prefer May 30th.

THE COURT: All right.

MR. MCENTIRE: My corporate representative -- my corporate representative is not available on May 30th. He's returning on the 31st from a vacation. And so, under the circumstances, we would request June 2nd.

THE COURT: Anyone have a problem with June 2nd?

MR. MORRIS: Can we go -- can we go with May 24th?

MR. MCENTIRE: My corporate representative is out the week from May 21st to May 31st.

THE COURT: Okay. Say again.

MR. MCENTIRE: I just received an --

MR. MORRIS: June 2nd.

THE COURT: Wait. Wait, wait, wait, wait. May 21st through May 31st?

MR. MCENTIRE: Yes, ma'am.

THE COURT: Okay. I'm just --

MR. MCENTIRE: So, under the circumstances, we would request --

THE COURT: I'm just letting you know, I am going to set aside a whole day. Okay? I don't know positively is it going to be evidentiary. What I'll do is, after the reply briefs, shortly after May 18th, I'll notify people you're going to be allowed to put on evidence or not.

But for your planning purposes, based on what I've looked at right now, again, the *Barton Doctrine* cases by analogy, it looks like the Court has discretion to hear evidence. Okay? So if people want to put on evidence, they're entitled to put on evidence. Okay? You don't have to. Nobody has to. But I think the Court in its discretion is going to hear it.

So I may read the briefs and do research, and if I change my mind, I'll let you all know May 19th or 20th.

All right. So, that being the case, it's difficult, because we're trying to find a whole day just in case we need the whole day. You just said your client representative, which is -- who is your client representative?

MR. MCENTIRE: Mr. Patrick.

THE COURT: He's gone May 21st through 31st?

MR. MCENTIRE: Yes, Your Honor.

THE COURT: All right. Did I hear June 2nd did not work for somebody else?

MR. MORRIS: Correct. Yeah, Your Honor. I'll be -- I'll be out of the country beginning the evening of the 2nd, returning the following Tuesday, so whatever date that is. I think the 6th. So I'd be prepared to go on the 8th or the 9th of June.

THE COURT: Okay. So, I'm sorry, you're out the 2nd through 9th? Is that what I heard?

MR. MORRIS: The 2nd -- the 2nd through the 6th, but I wouldn't want to do it on the 7th.

THE COURT: Okay. Well, --

MR. MORRIS: Or Thursday or Friday, June 8 or 9.

THE COURT: Okay. Anyone have a problem with June 8 or 9?

MR. MCENTIRE: Your Honor, the 8th is vastly superior, but I will confess the 9th is a college friend who will be staying at my house with my wife and kids, and my wife shouldn't be subjected to having to host him, but -- so if the 8th is available, I will beg for the Court's indulgence. But I'll be here on the 9th if that's requested.

THE COURT: Okay. Everyone good, --

MR. MCENTIRE: I might need a note.

THE COURT: -- June 8th? Everybody good with that? Okay. I'm hearing no objection. Traci, am I available?

THE CLERK: Yes. You have a Chapter 13 docket that afternoon, but I am sure we can work something out with Mr.

Powers.

THE COURT: Okay. So --

MR. MCENTIRE: Your Honor? Your Honor, this is Sawnie McEntire. For the record, I do need to lodge my objection, but I understand the conflicts. And so, subject to my objection, we agree to that date.

THE COURT: All right. So we'll start 9:30 in the morning, June 8th. And so I'm going to look for a scheduling order that uses these revised dates that I think I've heard you all will live with. May 11th for objections to the motion for leave, and that will include any briefs in support of the objections. And then May 18th for Hunter Mountain's reply and any briefing in the reply that responds to the objections. And shortly after that my courtroom deputy will let lawyers know, yes, she's going to hear evidence, or no, she's not going to have evidence. And the hearing will be June 8th at 9:30 in the morning.

Any other housekeeping matters while we are here? I mean, these are the only pleadings that are going to be allowed. How about that, among other things, as a housekeeping matter? Just these pleadings, except, obviously, if we have live witnesses and evidence on the 8th, you'll be bound by the Local Rule that says witness and exhibit lists are due three days before. Anything else that you all can think of?

MR. MORRIS: Your Honor, if I may, I greatly

appreciate your patience today. But I did want to just inquire as to the status of the decisions on the SE Multifamily HCRE matter as well as the motion to dismiss that was argued back in January. Not because I intentionally or unintentionally seek to pressure the Court, but I do think that those decisions will be helpful one way or the other resolving, you know, or getting some clarity in this case.

THE COURT: All right. Well, the next of those two items that comes out will be the SE Multihousing matter. My law clerk that's working on that is right over here to my right. And we think before the end of the week, but we are juggling lots of things, as you might imagine. So that one is next, and I'm hesitating to give you a time estimate on the other one, but it'll be next in the queue. We've had lots of different adversary proceedings in other cases that we've had to --

MR. MORRIS: Yeah.

THE COURT: -- work on. But I think, again, SE is probably towards the end of this week.

MR. MORRIS: All right. We appreciate the guidance, Your Honor.

THE COURT: Okay. She's giving me a thumbs up like I'm not overpromising. You can't see her from the video.

All right. So, everyone clear? I want to say in the strongest terms that I don't want an avalanche of pleadings.

Is everyone a hundred percent clear that we get the objections with supportive briefing May 11th, reply with supportive briefing on the 18th, and that's it? That's it. Other than witness and exhibit lists, --

MR. MORRIS: Yes, Your Honor.

THE COURT: -- if we have evidence. Everybody clear? Any questions?

MR. MCENTIRE: No, ma'am. Thank you. Thank you for your time.

THE COURT: Okay. Thank you. We are adjourned.

THE CLERK: All rise.

(Proceedings concluded at 3:12 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **04/25/2023**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

INDEX

EXHIBIT B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	May 26, 2023
	9:30 a.m. Docket
Reorganized Debtor.	
	- MOTION FOR EXPEDITED HEARING FILED BY HUNTER MOUNTAIN TRUST [3789]
	- MOTION TO CONTINUE HEARING FILED BY HUNTER MOUNTAIN TRUST [3791]
	- MOTION FOR EXPEDITED DISCOVERY FILED BY HUNTER MOUNTAIN TRUST [3788]

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

DALLAS, TEXAS - MAY 26, 2023 - 9:37 A.M.

THE COURT: All right. We're here for an emergency hearing in Highland, Case No. 19-34054. We have motions to take expedited discovery, and alternatively, a motion to continue the June 8th hearing, filed by Hunter Mountain Trust. So I will start by getting lawyer appearances. Who do we have appearing for Hunter Mountain?

MR. MCENTIRE: Good morning, Your Honor. This is Sawnie McEntire on behalf of Hunter Mountain Investment Trust, along with my partner, Roger McCleary, and an associate in our firm, Tim Miller.

And Your Honor, the audio is very low. I have mine cranked all the way up. I could barely hear you, with all due deference to the Court.

THE COURT: All right. Well, I'll try to talk louder. I don't know if it's a problem everyone's having, or just on your end.

All right. Who do we have appearing for Highland?

MR. MORRIS: Good morning, Your Honor. It's John Morris from Pachulski Stang Ziehl & Jones for the Reorganized Debtor and the Claimant Trust. And I do apologize for not having a necktie this morning, Your Honor. I'm out of town in the middle of nowhere and just don't have one with me. I do apologize.

THE COURT: Okay. Understood. This was an emergency

setting right before a holiday.

All right. Who do we have appearing for Mr. Seery today?

MR. LEVY: This is Josh Levy from Willkie Farr & Gallagher on behalf of Mr. Seery. I'm joined today by my colleagues, Mark Stancil and John Brennan.

THE COURT: Okay. Thank you.

Who do we have appearing for what I'll call the Claims Purchasers?

MR. MCILWAIN: Good morning, Your Honor. Brent McIlwain from Holland & Knight here for Farallon Capital, Stonehill Capital, Muck, and Jessup. David Schulte and Chris Bailey are also on, but I anticipate handling the hearing.

THE COURT: Okay. Thank you.

I presume that's all of our appearances. Is there anyone I have missed?

All right. Well, Mr. McEntire, this is all about you. This is all about your motion. Tell me what you'd like to present today.

MR. MCENTIRE: Thank you, Your Honor. Your Honor, it's difficult for me to see right here. Do we have a court reporter?

THE COURT: Of course we do.

MR. MCENTIRE: Thank you. Just the visual on my computer is not very good. Thank you.

Your Honor, we're before the Court today on a motion for

expedited discovery. Our motion, as well as the discovery we have propounded, it's certainly subject to and without waiving our prior objections to the evidentiary format that the Court has indicated it intends to conduct in connection with the June -- upcoming June 8 hearing.

As the Court knows, we have objected to the evidentiary format of that hearing. But in light of the Court's recent ruling on --

THE COURT: Okay. Can I just stop you there, because --

MR. MCENTIRE: Sure.

THE COURT: -- your motion, it made me think that you think I've ordered evidence. Okay? I thought I made clear in my order, you can use your time however you want on June 8th, argument, evidence, but the issue here is that you chose to put on evidence, the Dondero affidavit, and as we discussed at the hearing on what kind of hearing we're going to have, if you put on a declaration or an affidavit, every court in the country is going to say that witness has to be made available for cross-examination.

So you decided to start this with putting on evidence, so I was simply saying, okay, well, if you're going to put on evidence, then other people are entitled to cross-examine your witness. And I went further to say I think this is maybe a mixed question of fact and law, so therefore people are

entitled to put on evidence in that regard. Okay?

So I feel like we went through this all at the last hearing on what kind of hearing we're going to have. So, I mean, you may continue, but I just, I took issue just now with you saying basically I ordered there was going to be evidence, okay? I would have been perfectly --

MR. MCENTIRE: Okay, Your Honor.

THE COURT: -- fine if you wanted to just put on argument, but I feel like you kind of started the ball rolling by putting in evidence.

MR. MCENTIRE: Well, Your Honor, to respond to your comments at the beginning of this hearing, as I indicated during the course of the status conference, we have withdrawn Mr. Dondero's affidavits and all the supporting evidence in connection with our motion and provided --

THE COURT: Well, I mean, you haven't actually withdrawn it. You said you might want to withdraw it.

MR. MCENTIRE: Well, we're -- well, actually, Your Honor, my recollection is that we are -- we're not only prepared but we have withdrawn it, subject only to our reservation of rights to use that evidence should the Court allow Mr. Seery, the Highland parties, or any other party to offer evidence.

We strenuously objected to the evidentiary format, and our offer and tender in that regard was made in the context of our

position that the Court can make a ruling on the pleadings, which I understand now the Claims Purchasers actually agree with us.

So it's Mr. Seery and the Highland parties who have provided substantial briefing to the Court on why they are entitled to an evidentiary hearing. And we responded with substantial briefing to the Court on why we did not think evidentiary hearing was appropriate under the various legal standards.

And then we received the Court's order, which perhaps -- certainly allows the Highland parties and certainly allows Mr. Seery to put on evidence. It doesn't prevent them from putting on evidence. If they're entitled to put on evidence, then we should be entitled to conduct discovery. And if they're entitled to put on evidence, then we should be entitled to offer the material that was attached to our original motion. That is our position. And that is what prompted our initiation of the discovery requests that are now before the Court.

I'll make a further point that we do believe that the Court can conduct this hearing on colorability based upon the four corners of the document and the document references that are in the four corners of that document because that is a -- that is an appropriate inquiry. That is an appropriate judicial inquiry in connection with the type of proceeding

that's currently before the Court on June 8th.

Mr. Morris's attempt and Mr. Seery's lawyers' attempt to inject evidence into the proceeding we think is improper. However, if the Court is going to allow them to do so, then we're entitled to conduct discovery to protect our due process rights, which are very substantial.

What we have now is a very schizophrenic situation, because the Claims Purchasers are objecting to participate in any discovery. They're taking the position that they are not going to offer any evidence. But nevertheless, they're going to seek to benefit, undoubtedly, from any evidence that Mr. Morris develops or that Mr. Seery's counsel develops. So it's a bit of a whipsaw situation.

They opened the Pandora's box here, Judge. We tried to keep it closed. We said that in our briefing when we filed our last brief on May 18. They have opened a Pandora's box. And if they want to put on any evidence at all, then we're entitled to do discovery.

That's my response to your initial comments. I'm prepared to discuss more detailed arguments that have been presented in the responses, if the Court wishes, and I'd like to proceed on -- as well.

THE COURT: Okay. Let me stop. Can I --

MR. MCENTIRE: Your Honor, --

THE COURT: Let me stop. You said you would address

the responses. Have responses to your emergency motions that were filed Wednesday night and Thursday morning been filed and I just haven't seen them?

MR. MCENTIRE: Yes. There are two responses. They were both filed yesterday. The Claims Purchasers filed a response, I believe, midafternoon, and then I believe Mr. Morris and Mr. Seery's counsel filed a response yesterday evening. And I am prepared to respond to those, because I think we have some very serious issues that need to be presented to the Court for the Court to fully assess the situation.

Your Honor, --

THE COURT: Just a moment while --

MR. MCENTIRE: -- the joint opposition --

THE COURT: Just a moment. I'm pulling up the responses. Okay.

MR. MCENTIRE: Yes, ma'am.

THE COURT: They were filed at 7:25 p.m. last night. Okay. Or a response.

Let me stop you right now. Tell me what is your first choice of what you want here, okay? I'm just trying to understand. As you said, we have a lot going on here. You filed the motion. You filed an affidavit of Dondero supporting many of your factual allegations in your motion. What do you want? If we could go backwards in time, what

would you want the Court to do here?

MR. MCENTIRE: I think it's proper for the Court to conduct its inquiry based upon the four corners of the Exhibit 1-A which is attached to our supplemental motion. We believe the Court can make its decision on colorability based on the four corners of that document. We do believe that the Court, if it wishes to do so -- it does not need to do so -- but if it's going to consider anything extraneous to the four corners of that document, it would be limited to the documents that are referred to in that petition -- in the complaint, rather -- Exhibit 1-A to our supplemental motion.

We do not believe any additional discovery would take place, and we believe Mr. --

THE COURT: Okay. Remind me, because there were 300 pages plus of material, remind me of what Document 1-A was.

MR. MCENTIRE: Exhibit 1-A is the complaint that is attached to our supplemental motion.

THE COURT: Okay. Right. Okay. So that's what you were referring to. I thought you were referring to --

MR. MCENTIRE: Yes, ma'am.

THE COURT: -- an Exhibit A perhaps to that exhibit. All right.

MR. MCENTIRE: Exhibit 1 --

THE COURT: So you want me to scrap --

MR. MCENTIRE: Exhibit 1-A.

THE COURT: I mean, here's the problem. You've got a motion for leave that gives factual reasons why, in exercising the gatekeeper provision, I should allow that complaint to be filed, and it has an affidavit of Dondero. I don't know how to put that genie back in the bottle here. Tell me what you --

MR. MCENTIRE: I think it's very easy.

THE COURT: -- would have me to do, now that that's on the record and I've seen it.

MR. MCENTIRE: The Court can conduct a hearing on the four corners of the pleading, just like the Claims Purchasers also agree. So you have five parties in this case right now --

THE COURT: Okay.

MR. MCENTIRE: -- who all agree --

THE COURT: But what do I do about that motion that's on file and that affidavit?

MR. MCENTIRE: You could ignore the exhibits that are attached to it.

THE COURT: Except the complaint.

MR. MCENTIRE: Except the complaint. Exhibit 1-A attached to the supplemental motion. Yes, Your Honor.

THE COURT: So if you got what you want here, what are you saying, that you would, I don't know, agree to redaction of every sentence in your motion that refers to the

Dondero affidavit and also striking the Dondero affidavit? Is that what -- I'm just, I'm trying to give meaning to this.

MR. MCENTIRE: If that would help the Court, we can redact any reference to Mr. Dondero's affidavit.

THE COURT: I'm not saying --

MR. MCENTIRE: Now, we have allegations --

THE COURT: I'm trying to get at how we do what you want the Court to do -- that is, not consider evidence. And I'm trying to think of procedurally how we put the genie back in the bottle. So is that your answer, there would be redaction of every sentence in the motion for leave that is supported by the Dondero affidavit and then a striking of the Dondero affidavit?

MR. MCENTIRE: I would withdraw the Dondero affidavit and I would be prepared to redact those portions of our motion that refer to the Dondero affidavit. Yes, Your Honor.

THE COURT: All right. And so that would be your desired way to go forward on your motion, and then you just show up on the 8th and each make legal arguments?

MR. MCENTIRE: We would show up on the 8th and make legal arguments, assuming that Mr. Morris and Mr. Seery's counsel do not attempt to put on evidence. If they attempt to put on evidence, pursuant to the Court's most recent order, then we should be entitled to put on evidence as well, as well as the Dondero affidavit.

THE COURT: With Mr. Dondero in court subject to cross-examination?

MR. MCENTIRE: If that's -- if the Court allows Mr. Morris to examine Mr. Dondero in court, then he'll be subject to --

THE COURT: I'm asking what --

MR. MCENTIRE: -- cross-examination on the affidavit as well.

THE COURT: -- you want, okay? Quit saying if that's what the Court wants. I wish I wasn't here on Friday morning before a three-day weekend, okay? Tell me what you want, okay? Do you --

MR. MCENTIRE: Yes, ma'am.

THE COURT: You've just said --

MR. MCENTIRE: I believe --

THE COURT: -- you want only oral argument. That's what you want?

MR. MCENTIRE: Hunter Mountain Investment Trust believes that the hearing on June 8th should be conducted on the pleading only and no extraneous evidence offered, including Mr. Dondero's affidavit. That is what we want.

THE COURT: So you would say, Here is our proposed complaint and here's why we think it presents colorable claims? And you would make --

MR. MCENTIRE: Yes.

THE COURT: -- legal arguments of why colorable claims are articulated?

MR. MCENTIRE: Yes, Your Honor. And the Court may consider the documents that are referred to in the complaint, but Mr. Dondero's affidavit is not referred to in the complaint.

THE COURT: Okay. And remind me of what documents are referred to in the complaint.

MR. MCENTIRE: All of the documents are of public record, I believe. Various documents from the Court's docket, disclosure statements, the plan, the Claimant Trust Agreement, the notices of claims trading that occurred in the spring of 2021. I believe they're all traceable back to the Court's docket or otherwise accessible in your records.

THE COURT: And why would I need to look at those?

MR. MCENTIRE: That's a traditional -- if the Court wishes to do so, that's a traditional process of a 12(b)(6) motion, that courts may make an inquiry into documents that are referred to and incorporated into a complaint or a petition.

THE COURT: Well, I know Fifth Circuit authority permits the Court to do that, but I'm just wondering how looking at these items support the argument that your complaint presents colorable claims.

MR. MCENTIRE: Well, I think there -- it does so in a

variety of ways. The disclosure statements that are referred to, the projections on distributions that are referred to, are very supportive of the notion that the Claims Purchasers had access to information that no one else had access to. They invested $163 million or more in claims involving -- where they conducted no due diligence. And that's an allegation in the complaint.

They've invested over $163 million in purchasing these claims, when the disclosures were -- suggested that they would only get 71 percent on Plan -- on Tier 8 and zero percent on Tier 9. They invested a substantial sum of money in Tier -- related to Tier 9 when they were projected to get zero value.

I think that all supports the notion that sophisticated buyers who have their own fiduciary duties to their own investors would actually invest $163 million in purchasing claims in the absence of due diligence when the disclosure suggested a very pessimistic return. Those are the types of inferences that are properly and reasonably drawn, and accepting all of the allegations in my complaint as true and plausible.

Now, the Court certainly can determine if it wishes that my clients are not plausible, but we think that that's -- what I've just described is -- creates a robust circumstantial plausibility.

THE COURT: Okay. Well, I'm going to ask you one

more question, and then of course I'm going to let the others weigh in. And you used the term plausible, and we've talked about is plausible the same thing as colorable, and you think it is and others think it's not. But here is my last question for you. And I want to phrase this in as helpful a way as possible as I can. If all I hear is legal argument, and if the standard is plausibility, or if plausibility is the same thing as colorability, to me, the legal question that I have to decide, okay -- again, and I'm viewing the world through the lens you're viewing it, okay, that colorability is plausibility, and really all you need to do is look at the complaint and consider legal argument -- if that is the correct lens the Court is supposed to look through here, I'm telling you I think it will boil down to this question: When or under what circumstances can claims trading during a Chapter 11 case -- and it's a stretch here to say during a Chapter 11 case, right? It was post-confirmation, pre-effective date. But when can claims trading in connection with a Chapter 11 case give rise to a cause of action that either the bankruptcy estate or a shareholder of the debtor have standing to bring? Is that not the legal question that the Court would have to consider on June 8th if it's a plausibility standard and if it's just a legal argument, not evidence type of hearing?

Because I am, I'm just going to tell you right now, I'm

trying to be helpful in telling you what I think, I really struggle with how in the heck does the bankruptcy estate or a shareholder of the bankruptcy estate have a cause of action relating to claims trading. Okay? Claims trading is a robust industry in the world of Chapter 11, and it has been for decades. People who are as old as me remember when the bankruptcy rules changed in 1991, Rule 3001(e), to make claims trading simply a matter between buyer and seller, where the court doesn't even have to issue any order.

So I am trying to understand the theory of the proposed adversary proceeding. And because I cannot figure out a legal theory, that's why, in my view, I have gone overboard to be generous here and said, I'll consider evidence, maybe somebody is going to say something in evidence that helps me understand the legal theory. And, in fact, you put in an affidavit.

So, again, I'm being what I think is super-generous by saying, okay, you put on evidence, you want to put on evidence, fine, you put on evidence, but other people can put on evidence. And now you're saying, oh, never mind, I don't want to put on evidence. Okay. But tell me -- I guess, not to get ahead of things, but I'm trying to understand what the theory is here if all I'm supposed to do is look at the four corners of the complaint and view it under a 12(b)(6) plausibility standard. How is there a cause of action here?

MR. MCENTIRE: Okay. Your Honor, responding

specifically to your question, this has been thoroughly briefed in our reply brief that we submitted on May 18. It addresses your question on all corners.

This is more than just a claims-trading case. The estate was actually impacted. The estate is impacted because of what we are alleging to be a quid pro quo. Mr. Seery is placing individuals or companies or entities into positions to approve his compensation scheme, which we believe to be excessive. Even the compensation agreement that was recently produced by the Highland parties and Mr. Morris we believe reflects, in essence, an excessive agreement.

And the situation here is that the estate has been directly impacted, as well as innocent creditors and stakeholders, because money has been drained away from the estate. This is not a simple, pure claims-trading issue. It's not a situation between seller and buyer. This impacts the estate.

From all we know, because we've never seen the discovery, the sellers have already released all their claims. The estate would be the only one in the "Big Boy" agreements that are typical of these claims-trading arrangements. So the estate is the only truly aggrieved party, as well as Hunter Mountain, who would have standing to bring these claims. And these claims would not be released under the gatekeeping provisions because they would involve willful conduct.

Our allegation is a conspiracy to breach Mr. Seery's fiduciary duties, to line his pockets with extra money in a quid pro quo exchange for providing people he knows or companies he knows into positions where they can greatly profit from inside information.

THE COURT: Okay. So, --

MR. MCENTIRE: It's not limited to MGM.

THE COURT: So the whole --

MR. MCENTIRE: Yes?

THE COURT: -- theory of your case is Seery is being paid too much money for his role as Liquidating Trustee or Claims Trustee? That's what it's all going to boil down to?

MR. MCENTIRE: No, ma'am. That's just one aspect of our claim. I was responding to your question of why this isn't just a pure claims-trading case. We derive our standing to sue from other areas as well. As aiders and abettors in a breach of these fiduciary duties, --

THE COURT: What are the different --

MR. MCENTIRE: -- the Claims Purchasers are subject --

THE COURT: -- breaches of fiduciary duties? The claims that were sold were already allowed claims, which, while there was massive litigation involving these claimants, there was mediation during the case and there was a settlement of these claims and there were 9019 motions approved by orders

of the Court.

So, again, I'm trying to understand the theory of your case. The claims amounts were set. Whoever held them, the sellers, the purchasers, or someone else out there -- Carl Icahn, pick your Claims Purchaser -- the claims amounts were set.

So I'm trying to understand how you think the estate and the shareholder have a cause of action for the estate being harmed, when the claims amounts were going to be the same, okay, because they had already been mediated and settled and approved by final order, and the only thing I'm hearing is, because the Claims Purchasers are purportedly friendly with Mr. Seery, they approved exorbitant compensation for him that maybe some other claims purchaser would have resisted, and therefore the claim, the estate, and the shareholder have been harmed by whatever extra compensation is allowed. Is that what it all boils down to?

MR. MCENTIRE: I think, again, Your Honor, that's -- it's much more than that.

THE COURT: What is the much more?

MR. MCENTIRE: Your first question is --

THE COURT: What is the much more? And this isn't the hearing, this isn't the June 8th hearing, but I'm trying to understand, should I order people to sit for depositions over a holiday weekend, okay? That's what this is about. Or

should I continue the June 8th hearing because you think you need depositions, okay? I'm trying to understand the theory of the case before we can figure out, do we go down that trail?

MR. MCENTIRE: I'll try to be succinct, Your Honor, in responding to your last question.

Your first question was -- well, actually, there's several. Your first question was what fiduciary duties were breached? There is a fiduciary duty not to engage in self-dealing, not to engage in conflicts of interest, and duties of disclosure. We believe that Mr. Seery engaged with the Claims Purchasers to participate in a *quid pro quo* where he could be assured of significant compensation post-effective-date by placing two companies with whom he is very close and familiar on the Oversight Board, controlling the decisions of the Oversight Board. We believe that actual compensation agreement that has now been produced reflects excessive compensation. That hurts the estate. If it hurts the estate, it hurts the innocent stakeholders, including other innocent creditors and my client as former equity. That's number one.

Number two. What other evidence do we have within the four corners? First, they're allegations, but we believe that they're well-pled allegations under a 12(b)(6) standard.

If the only publicly-available disclosure that is available in February of 2021 is that Tier 9 will get zero

return, yet the Claims Purchasers spent $45 million or more on Tier 9 claims, and that Tier 8 is only going to get 71 percent return, and they nevertheless spent a total of $163 million, we believe those are clear, colorable, plausible allegations supporting a participation and receiving inside information.

Now, it is clear that Mr. Seery was aware of MGM. He disclosed it. We know he disclosed it because we have the allegations in the pleading. Not referring to Mr. Dondero. We also know that the Claims Purchasers rejected any suggestion that they would sell their participation in those claims for even a 40 percent premium.

Well, when they're projected to get zero return or 71 percent return, it's difficult to understand -- in fact, I don't think it's possible to understand -- why they would be unwilling to sell even at a 40 percent premium. That is the allegation.

This is not a summary judgment proceeding. This is an initial threshold pleading stage. And the Court is asking good questions. Hopefully I'm providing some good answers that can put our claim into context. This is not just a pure claims-trading issue.

Now, the claim sellers, when they -- the Claims Purchasers, when they participate in this agreement, this collusion, as we allege, or this conspiracy, as we clearly allege, they become aiders and abettors under relevant law.

And as aiders and abettors, they're subject to disgorgement. That would be a claim that the estate would have for aiding and abetting the breach of fiduciary duties of a CEO and a Trustee.

THE COURT: All right. Well, I'm going to hear from others, but --

MR. MCENTIRE: Your Honor, I will tell you that I do have -- if the Court does want us to address the discovery issues before the Court, I have a lot to talk about, but I understand you may want to first hear from other counsel on this issue.

THE COURT: Okay. I do. But I want you to know I'm struggling mightily with your legal theories, okay? And I'm letting you know, if all I do is consider legal argument, I don't know how in the world you're going to get there. You are complaining in essence about claims purchasing. Okay? You say you're not, but it all is at the heart of your theories, that these claims which were sold, which were mediated -- which were litigated heavily, were mediated, were the subject of settlement agreements and 9019 motions, and then the original claims holders, like many people in every bankruptcy -- not every; in lots of bankruptcies around the country -- choose to monetize their claims. And it happens all the time. It happens all the time.

And in 1991, the rules-making committee decided, you know

what, the bankruptcy judges don't even need to be in the middle of this. You just file a notice in the docket, and if the original seller, holder of the claim, wants to file an objection and say, I didn't sell my claim, they can file an objection and the court will hold a hearing. But absent that dispute between seller and purchaser, the bankruptcy judge, frankly, shouldn't care.

Now, we've had some extreme situations in certain cases. The old *Japonica* case from I think the 1990s where someone said the claims purchaser, their votes on the plan shouldn't count because they purchased their claims and were acting in bad faith. I mean, that is the only thing I can think of here where you say a person who purchases a claim during the case, then acts in bad faith, don't allow their claim for voting purposes. Or we've had a few weird cases out there where the claim is only allowed at the purchase amount for voting and distribution purposes.

But I have never, in 34 years, seen anything like this. And claims trading is a robust industry. People have made their livelihoods -- I mentioned Carl Icahn. I'm getting very philosophical. But this happens all the time. And you have set forth a proposed lawsuit that is arguing there was a breach of fiduciary duty by Mr. Seery by encouraging people friendly to him to purchase claims that had already been allowed. And, by the way, it happened post-confirmation, pre-

effective date. And there was a conspiracy here that the Claims Purchasers participated in.

If all we have is legal argument on this, I think you're going to lose. Okay? So, again, in my view, I am keeping an open mind and letting you put on evidence if there's some sort of evidence that you think is going to get me over the legal hump here, okay? So that's why we're here. Okay?

MR. MCENTIRE: Okay.

THE COURT: Okay. So, Mr. Morris, I'll let you go next.

MR. MORRIS: Thank you, Your Honor. I'd like to just defer, if I may, to Mr. Stancil first, Mr. Seery's counsel, and then I'll follow him.

THE COURT: Okay. Mr. Stancil?

MR. STANCIL: Good morning, Your Honor. This is Mark Stancil from -- thank you -- from Willkie Farr for Mr. Seery.

I think I just want to make three brief points, and Mr. Morris may wish to add before -- and I do want to invite my colleague, Mr. Levy, to address discovery issues if we turn to the scope of discovery.

First and foremost, and I think consistent with what I heard Your Honor say, I did not hear Mr. McEntire identify a single injury, hypothetical or otherwise, to the estate that does not derive exclusively from purportedly excessive compensation to Mr. Seery. So, every aiding and abetting or

breach theory that he articulated, the only way any of those could conceivably have harmed the estate under their theory is that Mr. Seery was somehow able to obtain outside compensation. And that is what this case boils down to. So none of the other -- whether -- how many causes of action he splits it into makes no difference.

I would add, moreover, that we completely dispute his characterization of Mr. Seery's compensation as excessive, and as I'd like to explain in just a moment, we believe we're entitled to show that.

But I would be remiss not to add that they filed this complaint alleging that Mr. Seery's compensation was excessive without knowing what Mr. Seery's compensation even was. So were he to rely truly on the four corners of his complaint, he has nothing, literally nothing to base this theory of excessive compensation on, besides absolute supposition.

Second, and I realize, Your Honor, this was supposed to be the topic for June 8th, as to what the proper standard is, and we've -- both sides have briefed that. Mr. McEntire has veered pretty heavily into that argument, so I just wanted to respond very briefly to a couple of his points.

It would make a mockery of the gatekeeping order were a party bound by it or subject to it entitled to simply make up assertions and say, well, I'll rely on these assertions, and the more false they are, the better, because that'll get me

past the gatekeeping and I can then file it.

So, for that reason, we believe it is clear under *Barton* and vexatious litigant doctrines, upon which this Court's gatekeeping order was expressly based when it was ordered, that we believe that even if they choose to rely solely on the four corners of their complaint, we are entitled to submit, if we so choose, evidence that directly rebuts and renders any allegation facially implausible. And we think that that's exactly what Your Honor will see here. The documents -- and perhaps Mr. Morris would care to address these in more detail; I'll defer to him -- but the documents and evidence we would present and will present at the hearing, most of which is already just attached to our motion, will blow this out of the water. It's an absurd allegation. And the idea that we have to allow this to be filed because they choose to make what are, candidly, bald-faced lies in a complaint and just say, well, we're now going to ignore our attempt to support it with any evidence, but you can't contradict any of our assertions in our complaint, we think that would be completely -- completely improper.

And we think, to the extent the complaint on its four corners would rely on the say-so of a party in interest such as Mr. Dondero, we would be entitled to cross-examine him.

You know, there are complaints that have objective, verifiable, or at least testable evidence that is independent

of someone's personal recollection, that he must have had some phone call or claims, as is the case here, that essentially third parties confessed in an unrelated phone call to some criminal scheme to him.

The last point I'll make before I turn it over to Mr. Morris is we think it's very important, whatever the Court's decision today with respect to discovery, that we keep the June 8 date. This is hanging over the estate. As all of us know, the longer something runs, the more expensive it is, no matter what. We believe every lick of discovery that's appropriate, if that's what the Court orders, can be done. Everybody can be deposed. It'll all get done by June 8th. And those of us who are in the bankruptcy trenches know that people have moved far greater mountains than these in shorter periods of time.

So, with that, we think it's really important to hold that hearing date and get past this.

THE COURT: Okay. Thank you.

Let me ask you what you think of the idea I put out there of, assuming we can kind of put the genie back in the bottle here, if Mr. McEntire withdrew the Dondero affidavit and we had redaction of every sentence in the motion for leave that mentioned the Dondero affidavit, is your client opposed to that and then just going forward with legal argument on June 8th? I'm not clear on that.

MR. STANCIL: Yes, Your Honor. Yes, Your Honor. On behalf of Mr. Seery, he is opposed to that for two reasons.

Your Honor will recall that the complaint basically alleges that Mr. Seery took what they call nonpublic information and gave it to somebody, in violation of his obligations. That is just an absolute fabrication that we're entitled, on a gatekeeping standard, to rebut. If they choose to limit themselves to the four corners, that's fine. But it's a contested matter. It's not an adversary proceeding yet. They're trying to get there. It's a contested matter, and we're entitled to put on evidence to show that they cannot meet the colorability gatekeeping standard as expressed in this Court's order.

So if they choose to limit themselves to their say-so even in a complaint, I do believe, Your Honor, that we would be entitled to show contrary evidence. And whether it persuades Your Honor that it's not colorable after we've shown it to you, that's up to Your Honor.

For example, if the complaint were to allege that the sun sets in the east and rises in the west, well, we should be able to put on a photograph that says no, here it is in the west, here it is in the east. And it would be perverse to say that they can file a complaint that's subject to a gatekeeping order just based on their say-so. I mean, ironically, the more absurd and disprovable the allegation, the easier it is

to get past, in theory, get past some sort of gatekeeping order, and it should be just the opposite. We believe we're entitled to that under the Rules, Your Honor.

THE COURT: All right. So you want to put on Seery, Mr. Seery, at the June 8th hearing?

MR. MCENTIRE: Let me just check, Your Honor, one phone. Yes.

THE COURT: Okay. All right.

Well, I guess I'll go to -- well, Mr. Morris, did you want to speak next?

MR. MORRIS: I do, Your Honor.

THE COURT: Okay. Go ahead.

MR. MORRIS: I do. And I'll join in Mr. Stancil's presentation, with one modification. I think he may have misspoke in suggesting that Hunter Mountain alleged that Mr. Seery's compensation was, quote, excessive. They did not make that allegation. They're making that allegation now because they've actually seen Mr. Seery's compensation package. They had no knowledge of Mr. Seery's compensation package until we voluntarily disclosed it as one of our exhibits in opposition to the motion.

The allegation in the complaint is not that Mr. Seery's compensation is excessive, it's that it was rubberstamped by his age-old friends at Farallon and Stonehill in exchange for the delivery of this so-called material nonpublic information.

So I otherwise agree with Mr. Stancil. But let's -- it's very important for the Court to hold Hunter Mountain to the allegations in their complaint, because this is what we have seen for three years, the shifting tides of allegations. It's the same game of Whack-a-Mole that we did for two years in connection with the notes litigation.

I am very sensitive to these things, Your Honor. The allegation in the complaint is *quid pro quo*. It's not, oh, I've now seen Mr. Seery's compensation package and it's excessive. For somebody who is asking the Court and swore to the Court that $70 million of notes would be forgiven because Jim Seery as the Highland representative sold MGM assets, for him to suggest that this is excessive is unbelievable.

Let me take a step back, Your Honor. The Court can certainly take judicial notice of the fact that it is the sixth body to consider these insider trading allegations. Mr. Dondero filed a 202 seeking discovery based on it. And yet how can he have a colorable claim today when he couldn't state a colorable basis simply to get discovery? Boom. They shut the door on him in Texas state court.

Doug Draper wrote an enormous letter to the United States Trustee's Office, put forth an enormous amount of paper, made the allegations of insider trading. They can't state a colorable claim today because they couldn't state a colorable basis to get the United States Trustee to commence an

investigation.

Mr. Rukavina did the same thing. No investigation.

Hunter Mountain. They filed a 202 petition. They couldn't state a colorable basis to get discovery.

And then my favorite is the Texas State Securities Board. I've now learned that indeed they did commence an investigation on the basis of Mr. Dondero's complaint. It wasn't just a review. It was actually a heightened inquiry. And after considering everything, the Texas State Securities Board said, we are taking no action.

You are the sixth body to consider. I think, when deciding whether or not there is a colorable claim, we're done, frankly. 0-for-6.

Next, I think the Court can certainly take judicial notice of newspaper articles. And the fact that Mr. Dondero had absolutely no duty whatsoever to send that email on December 17th. Look at the context in which it was sent. It's laid out very clearly in our opposition. And four days later, the *Wall Street Journal* -- not, you know, an obscure publication -- publishes an article that says MGM has retained investment bankers. They identify the investment bankers. They say there is a formal process going on to sell the company. They quote the chairman of the board that says we're actively selling the company. We have four interested parties, and two of them are Apple and Amazon, the very two people that four

days earlier Jim Dondero, for no reason at all other than to gum up the wheels, tells Jim Seery about. The Court can certainly take judicial notice of these things.

And then, finally, I don't know how Hunter Mountain can tell the Court that they should accept the allegations in the complaint as true when we got four months of negotiations over Mr. Seery's compensation. The allegation in the complaint is that it was rubberstamped. We will put in documentary evidence -- you don't have to accept that if there's no credibility determination on this point, but this is really -- this is yet another reason why there's no -- there can never be, as a matter of fact, a colorable claim here. I appreciate the legal points that Your Honor made earlier, but as a matter of fact, there is -- it is inconceivable that there could be a colorable claim, because the claim is *quid pro quo*. Rubberstamped. That's their word. The Court already has in the record evidence showing that that is a lie. They had no basis. They have no knowledge. They had no inquiry as to how his compensation, but they said it was rubberstamped as part of a *quid pro quo*. Just look at the exhibits that Your Honor has already.

The Court is supposed to say, "I accept the allegations as true," when it has documentary evidence that shows the allegations are false? In what world would that be just?

I don't want to get directly involved in the discovery

disputes. I'll leave that to Mr. Seery's counsel. But whether it's on a legal basis or a factual basis, the fact of the matter is that they sought discovery not once but twice. They got nothing. And yet here they are, pressing the same allegations.

I only ask the Court to hold them to their allegations. Do not let them use what they get in discovery to say, Aha, we have a new claim. That's not the way this process works. The question is whether they have stated a colorable claim. And we have already proven, frankly, as a matter of fact and as a matter of law, that there is not only no basis to these claims, these claims are not made in good faith.

Thank you, Your Honor.

THE COURT: All right. You said you'd defer to Mr. Seery's counsel on the discovery questions. I just want to -- I'll ask you the same question.

MR. MORRIS: Yeah.

THE COURT: If you had your way, what would the hearing on June 8th look like? And I guess you're on the same page as Mr. Stancil, that Mr. Seery should be allowed to testify?

MR. MORRIS: I believe that's right, Your Honor. Only Mr. Seery can say what Mr. Seery did, instead of drawing just absurd inferences based on absolutely nothing. And I think, I think the record will be clear. I think he should

authenticate, for example, the documents relating to the negotiation of his compensation package. I think he should be able to tell the Court that he never disclosed anything about MGM or this other -- there's no *quid pro quo*. He barely knew these people, if he knew them at all. This is just, you know, this is just more of the same, Your Honor. It's more of what we've been doing for three years.

And I'll just repeat, you are the sixth body to pass on these so-called insider trading allegations. And you're actually being asked to do substantially more than the five prior bodies declined to do.

THE COURT: Okay. Two --

MR. MORRIS: Right. They declined to get discovery. They declined -- yeah.

THE COURT: Two Texas state court judges in a Rule 202, --

MR. MORRIS: Right.

THE COURT: -- we want pre-lawsuit discovery; the Texas Securities Board; and the U.S. Trustee? Now, who's the other one?

MR. MORRIS: The U.S. Trustee twice.

THE COURT: Oh, twice?

MR. MORRIS: The U.S. Trustee twice, because there were two different letters, --

THE COURT: Okay.

MR. MORRIS: -- each of which addressed the so-called insider trading allegations. And that's how I get to five.

THE COURT: Okay.

MR. MORRIS: And I just think that that just is really illustrative of, you know, the lack of credibility, the lack of bona fides, the lack of truthfulness in the allegations that are being pressed here.

THE COURT: All right. Mr. McIlwain, anything you want to add to this discussion?

MR. MCILWAIN: Yes, Your Honor. And I'll be brief. And if I may, because I suspect you're going to ask me the same question, I might start with my answer regarding the hearing.

From our perspective, from the Claims Purchasers respective, and I think we're uniquely situated, we're different in most regards, if not all regards, than Mr. Seery in that we are just Claims Purchasers. Now, my clients are on the Oversight Committee, and I think we're protected by the gatekeeper as a result of that.

But based on the allegations set forth in the four corners of the complaint, and our response was narrowly tailored, directed to issues that did not have anything to do with the facts, they were legal bases for denial of the motion for leave. And in that regard, Your Honor, I would be fine and my clients would be fine if this hearing were conducted on a

purely -- purely based on the pleadings, on legal arguments and with no evidence.

That being said, I understand Mr. Stancil's position and Mr. Seery's position that there is some need, from their perspective, to clean up the record, when, you know, frankly, the bona fides and reputation is being attacked. I understand that. But from my perspective and from my client's perspective, I think we're prepared to move forward on the 8th purely on a legal basis.

In all of our response -- in each one of our responses, the items that we responded to, Your Honor, we did so very carefully not to raise evidentiary issues, affirmative evidentiary issues from our perspective. They either referred to purely legal questions, and in which case we think we win, or refer to, you know, documents that were on file with the Court.

Moreover, Your Honor, we do not -- you know, I understand the Court may not have had an opportunity to review our response that we filed late yesterday, but the Claims Purchasers have no intention of presenting any evidence at the June 8th hearing. We don't intend to put on any witnesses. We don't intend to submit any exhibits.

And frankly, Your Honor, and I know we've covered a lot of ground today, but as it relates to the motion that's on file today, Hunter Mountain Investment Trust's request to take

expedited discovery, which is being heard, as the Court noted, the Friday before Memorial Day, right, we would submit that that's completely inappropriate for our clients to be subjected to any discovery at this point. As Mr. Morris pointed out, two state courts have already denied these requests.

And if the Court were to allow Hunter Mountain to take discovery in the face of us stating on the record and in pleadings that we have no intention of putting on any witnesses or submitting any evidence at the hearing, I mean, it essentially turns the gatekeeper order on its head, or provision on its head. Because what that would mean is that they can file a complaint, or a motion for leave to file a complaint, they can make any allegations they want, and if you respond to that motion to leave, you're now subjected to discovery, and so they can go out and search and try to find some other claim.

Ordinarily, Your Honor, it wouldn't -- discovery, from my perspective, doing this for 25 years, I wouldn't have an issue with discovery. This is different. This is different because Hunter Mountain and Mr. Dondero have taken every opportunity to harass various parties in the case. And, you know, someone would ask, why would -- why do claims sellers sell their claims? My Lord, why wouldn't you want to get out of this case? I mean, I can't imagine being subjected to this

litigation, as Mr. Seery has been subjected, year after year after year. And successfully. Mr. Seery has been successful in every regard.

So, Your Honor, we -- in summary, I think the Court hit it right on the head. This is -- these are -- at the heart, this complaint is about claims trading. We complied with Rule 3001. The Court has no role in respect to the claims trading. The fantastical allegations that they've made as it relates to these claims trade don't -- have no impact, frankly, on the fact that the claims were allowed, they were litigated, they were mediated, and they're only entitled -- the Claims Purchasers are only entitled to get whatever the claims are, right? These claims don't get enlarged. They're not equity. They're claims. They're claims that were converted, by the way, into trust interests. So, you know, as we point out in our response, we think many of the points and relief that Hunter Mountain is requesting just can't even be granted by the Court. In fact, we can address those on June 8th.

At the end of the day, we're here on a discovery motion that has been filed on an emergency basis to seek discovery. And from my clients they're seeking four depositions. Four -- so 16 hours of depositions. Over 30 topics, with 19 different document requests. Your Honor, if we're not going to present any evidence and we're not going to put any witnesses on, I would submit that that's totally inappropriate and it flies in

the face of the whole point of the gatekeeper. And that's why we would ask that, at least as it relates to the Claims Purchasers, that Hunter Mountain's motion for expedited discovery be denied.

THE COURT: All right. Mr. McEntire, I'm going to give you the last word. And let me tell you what I'm inclined to do based on everything I've heard.

If someone wants to put on Mr. Seery -- Highland or Mr. Seery's counsel -- I'm going to hear evidence from Mr. Seery on June 8th. And if you want to withdraw the Dondero affidavit and the Court will redact or have you file a redacted version of your motion for leave that strikes every sentence that refers to the Dondero affidavit, no other changes, just that, you can do that. Or if you don't do that, then Mr. Dondero, you can put him on if you want, or he has to be available for cross-examination. Okay?

But that would be it. No Claims Purchaser witnesses. And I'm not continuing the hearing beyond June 8th. You can get depos done, if you both want to do depos or one of you wants to do depos, between now and June 8th. Not on the holidays, by the way. I'm not going to order anyone to appear sooner than, say, Wednesday of next week.

But that's what I'm inclined to do. And one thing that's rolling around in my brain is I do remember the 202 suits in Texas state court as, starting two years ago, opportunities to

take discovery. So I don't know why at this late stage I would allow discovery of the Claims Purchasers, especially when this really looks like it's more about Mr. Seery and Mr. Dondero than them. And again, the whole policy that the Court really isn't supposed to get in the middle of claims trading.

So that is what I'm inclined to do. Tell me what different view of the world you want me to consider.

MR. MCENTIRE: Well, with all due respect, Your Honor, my view of the world is substantially different. We would, of course, object if that's your ultimate ruling, for the following reasons.

The 202 petitions having nothing to do with colorability. The court, to address the Hunter Mountain 202 pleading or petition, did not specify a reason. But I would advise the Court, and we -- actually, you could take notice of the record of the proceedings. They earnestly argued that you, Your Honor, were in the best position to address these issues. So I think it's highly likely that the judge who addressed the 202 petition that Hunter Mountain had filed did so in deference to you. Not to suggest --

THE COURT: Did it --

MR. MCENTIRE: -- to you how to rule.

THE COURT: Did it happen twice? Same judge twice, or two different judges?

MR. MCENTIRE: Oh, I'm sorry. There were two

different judges, but Hunter Mountain was not involved in the first inquiry at all. And they argued standing in that issue. And that's a totally different proceeding, totally different issues, totally different evidence got put on before the Court. And totally -- and Farallon's counsel, who's actually on this website today, earnestly argued that you were in the best position to address these discovery issues. That's in his briefing and his oral argument. That's number one.

Number two, the Texas State --

THE COURT: Did you ever bring --

MR. MCENTIRE: -- Securities Board --

THE COURT: -- a 2004 exam asking me to? Because the reason I remember this is because the Claims Purchasers actually removed from state court to this Court the first 202 state court action, if that's what you call it, an action, pre-action discovery. And I remanded it --

MR. MCENTIRE: Pre-suit discovery. Yes, Your Honor.

THE COURT: I remanded it back, with some angst, because I'm like, okay, well, there's a tool, 2004, and I don't know why we're doing this in state court, but if that's what whoever it was at the time, Hunter Mountain Trust or whoever it was, if that's what they want to do, they can do it. Okay?

MR. MCENTIRE: Sure.

THE COURT: So when they were unsuccessful --

MR. MCENTIRE: So, Hunter Mountain --

THE COURT: -- I don't know why they didn't -- well, anyway, I'm just baffled.

MR. MCENTIRE: Hunter Mountain Investment -- yes, if I could finish my comments, Your Honor. Hunter Mountain Investment Trust was not involved in that. Hunter Mountain Investment Trust filed its 202 petition because of timing issues because we were concerned we were going to meet with the same obstructive tactics that we're seeing today in this court, --

THE COURT: Who was involved?

MR. MCENTIRE: -- trying to oppose this.

THE COURT: If it wasn't Hunter Mountain, who was it?

MR. MCENTIRE: It was Jim Dondero.

THE COURT: Okay.

MR. MCENTIRE: Hunter Mountain was only involved in one proceeding, and it was in February and March of this year. And immediately after that resolved, we proceeded to move in this court. We were concerned about limitations issues with regard to one of the individual claims and one of the causes of action, so we proceeded to file our motion for leave of the gatekeeping order.

Our history is very simple. It's very clear. It has not been harassing. And it's very clearly identified as we've only been in two courts on this issue, the 202 petition and

your court, and that's it. To suggest that we're harassing is just a distortion.

There are some other distortions. Mr. Morris is absolutely wrong. We have specific allegations as to excessive compensation in the complaint. And it's interesting how counsel can make a characterization but omit facts or allegations that are inconsistent with the truth.

And so I find it amazing that Paragraph 71 stands out like a sore thumb, where we specifically allege excessive compensation that Mr. Seery garnered from his deal. That's the second thing.

We have a situation where the Claims Purchasers have never clearly denied access to material nonpublic information. They have never clearly denied that they did no due diligence, yet they obstructed discovery in the 202 petition and now they obstruct discovery here.

A Pandora's box has been opened. To allow Mr. Seery to take the stand and to explain that he didn't do this or didn't do that and allow the other part of the conspirator group, Mr. McIlwain's clients, escape and avoid being tested and challenged in cross-examination is the epitome of a deprivation of due process. We will be deprived of our due process rights if you singularly let Mr. Seery take the stand and prevent our right to take discovery from the Claims Purchasers.

They do not want to be challenged. They do not want to open the door as to what happened here. And they've been trying to prevent that from day one.

We don't think that evidence of any type is appropriate. But if you're going to let any evidence in, you cannot let -- you can't let part of the toothpaste out without letting it all out. And so we're entitled to a full-blown discovery and a full-blown evidentiary hearing if in fact you allow any evidence in.

We agree with the Claims Purchasers' lawyer that it shouldn't come in generally, and that includes Mr. Seery, and that includes Mr. Dondero, and that includes everything else, except the four corners of our pleading. And we're prepared to stand on that, subject to the pertinent rules that deal with 12(b)(6) inquiries.

Your Honor, what we've done today is we've talked about the merits of our claim before the June 8th hearing. The only issue before the Court today was a discovery issue, which we've never really addressed, because Mr. Morris and Mr. Seery's counsel are trying to slide over the fact that they have objected to some of our discovery, refusing to produce documents that go to the very core of our claim. They are seeking to prevent access and Mr. Seery's deposition on communications with the Claims Purchasers dealing with the asset values and projections, distributions from the estate.

Well, that's the guts of material nonpublic information.

And we -- this case is not limited to MGM as much as Mr. Morris would like to do so. A fair reading of our complaint in Paragraphs 3, 13, 17, 47, 50, and 51 make it very clear that this is a lot larger than just MGM.

And Your Honor, to allow them to put Mr. Seery on the stand without our right to depose him and have documents relating to his communications --

THE COURT: Wait, wait, wait.

MR. MCENTIRE: -- with the Claims Purchasers --

THE COURT: Wait, wait, wait. Maybe I was not clear. You all can depose -- if Seery is going to testify, you can depose him before June 8th, just not over the holiday weekend. Okay? And --

MR. MCENTIRE: Yes, I understood that.

THE COURT: And -- and -- and --

MR. MCENTIRE: But they're trying to prevent --

THE COURT: And -- and -- and -- and if you're not going to withdraw the Dondero affidavit and redact the sentences in the motion for leave that mention the Dondero affidavit, okay, so if you're going to rely on Dondero's affidavit or call him at the June 8th hearing, they can depose him. Again, not over the holiday weekend.

But I'm just saying that's as far as I'm going to let the evidence go. I'm not going to allow depositions of Claims

Purchasers unless you somehow show me you've got a colorable claim or claims in your proposed complaint. Then, if I say yes, then normal discovery rules will apply. We have very much a cart-before-the-horse situation here.

MR. MCENTIRE: We do. I agree with that. Completely. And in fact, what was happening here, Your Honor, with all due respect, is you're just addressing the colorability of my client's claims to determine whether I can conduct discovery, but they want to put discovery on to challenge the colorability of my claims. Somewhat circular, Your Honor, with all due respect. And so we're truly being deprived --

THE COURT: Well, again, --

MR. MCENTIRE: -- of our rights.

THE COURT: -- again, I go back to where it all starts, and it starts with your motion attaching a Dondero affidavit. That's where it all starts. You could have just filed a motion making legal argument. And if you just wanted to make your legal argument at the hearing on this, then that would have been fine to the Court. But once you filed that affidavit, all I can say is everything changed. I used the genie-in-the-bottle analogy.

So I'm giving you every opportunity here to present your colorable claim. And I have told you that, if it all comes down to legal argument, I'm not sure how you're ever going to

convince me. I'm saying you can --

MR. MCENTIRE: Well, I --

THE COURT: I'm saying you can take back the Dondero affidavit if you want. I'm saying you can go forward with it if you want, but they can cross-examine him if you do. But now that the genie is out of the bottle, I can understand the Defendants wanting to put on their own countervailing evidence, because the genie is out of the bottle. I've already read your motion and I've read the Dondero affidavit. I can't unsee it. So if --

MR. MCENTIRE: The genie is not out of the -- with all due respect, Your Honor, the genie is not out of the bottle because we have a right to amend or supplement, and that's effectively what we've done here. And so you do not --

THE COURT: And I want you --

MR. MCENTIRE: -- need to consider the Dondero --

THE COURT: -- to be clear about what I am saying. If you want to take it back, you can. If you want to refile the motion, merely redacting those sentences that refer to the Dondero affidavit and not filing the Dondero affidavit, I'll let you. But I'm not going to stop the other side from putting on Mr. Seery out of concern --

MR. MCENTIRE: Right.

THE COURT: -- that I've already read that stuff. Okay?

MR. MCENTIRE: All right.

THE COURT: And I don't think they like that, --

MR. MCENTIRE: I understand your ruling.

THE COURT: -- especially. I don't think they like it, especially. I think they'd now like probably to cross-examine Mr. Dondero. But I'm giving --

MR. MORRIS: If I may, Your Honor, just really --

THE COURT: Go ahead.

MR. MORRIS: I'm sorry. I was just --

MR. MCENTIRE: Your Honor, if I can finish --

MR. MORRIS: (overspoken)

MR. MCENTIRE: -- my presentation.

MR. MORRIS: We have relied --

MR. MCENTIRE: I understand your ruling.

MR. MORRIS: We have relied on the Dondero affidavits. They were analyzed and reviewed extensively in the opposition. I think it would be very prejudicial if they were allowed to withdraw them. But, you know, the Court has to do what the Court thinks is right.

But I do want to point out that Mr. McEntire made the point at the status conference that he was considering withdrawing the affidavits. He didn't do so. We did an extensive analysis of those affidavits. We relied on them. And only in reply did they say, oh, we're withdrawing them. I just don't think that's proper.

THE COURT: Okay.

MR. MCENTIRE: Your Honor, I have a few more comments to clarify your ruling, please.

THE COURT: Okay. Go ahead.

MR. MCENTIRE: Number one, we have withdrawn the affidavit, number one.

THE COURT: You -- it is still --

MR. MCENTIRE: We reserve the right, if you --

THE COURT: When did you withdraw it? Because I just looked at the docket. It's not withdrawn.

MR. MCENTIRE: I did it at the status conference. And if there's any ambiguity or concern or confusion about that, --

THE COURT: It is on the docket.

MR. MCENTIRE: -- I clearly did it --

THE COURT: It has been publicly available for weeks now.

MR. MCENTIRE: It was formally done in our reply on May 18, and so there can be no ambiguity. If you'd like for me to withdraw it from the public record, I'll be glad to do so.

THE COURT: Okay.

MR. MCENTIRE: I didn't know that was an additional issue.

THE COURT: I mean, here -- I gave you this emergency

hearing. You asked for 45 minutes. I actually have a conference call at 11:00 o'clock.

Here's what I'm going to do. We'll have yet another order regarding what kind of hearing we're going to have on June 8th, and it will clarify that Mr. Seery can testify and Mr. Dondero can testify, and both of them shall be made available for depositions before June 8th but not sooner than next Wednesday. And that is the evidence that the Court will consider. No other deposi...

MR. MCENTIRE: Your Honor, we --

THE COURT: No other -- I'm still talking. No other depositions will happen between now and June 8th. You can make your legal arguments, you can put on your witnesses, and the Court is going to rule. Okay?

MR. MCENTIRE: I understand your ruling. There's one additional clarification, Your Honor.

THE COURT: Okay.

MR. MCENTIRE: We would like for the documents to be produced that we've requested from Mr. Seery. They're important to allow us to conduct his deposition. And we specifically would like the objections to the production of documents to be overruled.

If the Court wants to take that under advisement because of the shortness of this hearing today, that's fine, but it's very important that we have access to information relating to

the value of the estate, communications with the Claims Purchasers about the value of the estate, projected distributions. And specifically, I'll provide the reference, we have allegations in Paragraphs 24, 59, and 99 that relate to this, as well as all the communications regarding insider trading that would be -- that would support the relevance. It's Request for Production Number 1-H through J.

THE COURT: Okay. Let me stop you.

MR. MCENTIRE: And it's Request for Production --

THE COURT: I'm denying that request. Okay. And I'm going to go back to the cart-before-the-horse analogy. You know something, you have something that makes you think you have colorable claims. Okay? You can put on your witness and try to convince me. You can cross-examine Mr. Seery and try to convince me. Okay? But if you convince me, then there'll be a normal lawsuit and discovery. But at this point, I think it's a very improper request. Okay? So that's the --

MR. MCENTIRE: Please note for the record, Your Honor, that we're being denied the opportunity to depose Mr. Seery fully and completely without the production of these documents. We understand your ruling, however. Please note our objection.

THE COURT: All right. I will see you on June 8th. We're adjourned.

MR. MCENTIRE: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 10:55 a.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **05/27/2023**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

INDEX

EXHIBIT C

From: Stancil, Mark
Sent: Monday, June 5, 2023 5:39 PM
To: Roger L. McCleary; Sawnie A. McEntire
Cc: John A. Morris; Levy, Joshua S.; Brennan, John L.; Hayley R. Winograd; Jeff Pomerantz; Gregory V. Demo
Subject: RE: [EXTERNAL] HMIT

Roger & Sawnie,

We are in receipt of your additional redactions. For reasons stated in my prior email, among others, we do not agree that these redactions are sufficient. But I believe we have fully elucidated each other's positions on this issue, and we can let the Court decide the issue if needed.

Mark

–

Mark T. Stancil
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On June 5, 2023 at 3:08:28 PM EDT, Roger L. McCleary <rmccleary@pmmlaw.com> wrote:

> ***** EXTERNAL EMAIL *****
>
> Mark,
>
> We disagree. However, in the interest of attempting to address some of your concerns, we are filing another copy of HMIT's redacted Motion for Leave with addition redactions.
>
> Regards, Roger.
>
> Roger L. McCleary
> **Parsons McEntire McCleary PLLC**
> One Riverway, Suite 1800
> Houston, TX 77056
> Tel: (713) 960-7305
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>

From: Stancil, Mark <MStancil@willkie.com>
Sent: Monday, June 5, 2023 12:26 PM
To: Sawnie A. McEntire <smcentire@pmmlaw.com>
Cc: John A. Morris <jmorris@pszjlaw.com>; Levy, Joshua S. <JLevy@willkie.com>; Roger L. McCleary <rmccleary@pmmlaw.com>; Brennan, John L. <JBrennan@willkie.com>; Hayley R. Winograd <hwinograd@pszjlaw.com>; Jeff Pomerantz <jpomerantz@pszjlaw.com>; Gregory V. Demo <GDemo@pszjlaw.com>
Subject: RE: [EXTERNAL] HMIT

Sawnie,

HMIT's redactions are inadequate. Numerous paragraphs continue to refer explicitly to "sworn declarations," "evidence," the "record," and similar terms based on the purportedly withdrawn evidentiary materials. See, e.g., ¶¶ 14, 15, 23, 28, 36, 42. In numerous other instances, the motion merely "withdraws" a reference to the declarations/exhibits, but leaves intact the same factual allegations originally based on the purportedly withdrawn materials and/or includes references to documents originally attached via purportedly withdrawn declarations. See, e.g., ¶¶ 23, 24, 25, 28, 32, 36, 44, 46. Attached you will find a copy of the redacted filing with additional highlighted text identifying these defects. We have endeavored to take a narrow view of proposed additional redactions (including, for example, leaving in allegations based upon public court proceedings).

We reserve all rights to contest the nature and scope of HMIT's submission and support therefore, including but not limited to the propriety of further evidentiary proceedings and the adequacy of and/or lack of support for the remainder of HMIT's submission.

Please file any additional redactions no later than 4:30 P.M. CT today, so that the parties can adjust their witness/exhibit lists accordingly.

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From: Sawnie A. McEntire <smcentire@pmmlaw.com>
Sent: Monday, June 5, 2023 10:57 AM
To: Stancil, Mark <MStancil@willkie.com>
Cc: John A. Morris <jmorris@pszjlaw.com>; Levy, Joshua S. <JLevy@willkie.com>; Roger L. McCleary <rmccleary@pmmlaw.com>
Subject: RE: [EXTERNAL] HMIT

The operative proposed Complaint is attached to the Supplement. We do not think the Supplement requires any redaction.

Subject to our stated objections relating to the evidentiary format adopted by the Court, as well the Court's denial of our requested discovery, we reserve the right to call Mr. Dondero live at the hearing and the right to examine him in full if you decide call him as a witness.

From: Stancil, Mark <MStancil@willkie.com>
Sent: Monday, June 5, 2023 9:51 AM
To: Sawnie A. McEntire <smcentire@pmmlaw.com>
Cc: John A. Morris <jmorris@pszjlaw.com>; Levy, Joshua S. <JLevy@willkie.com>; Roger L. McCleary <rmccleary@pmmlaw.com>
Subject: RE: [EXTERNAL] HMIT

We received the notice and are reviewing. Will you be filing a redacted version of HMIT's Supplement (Dkt. 3760) and Reply (Dkt. 3785)? Relatedly, it appears your redacted filing today attached the original complaint. Is that the operative proposed complaint, or is it the amended version attached to the Supplement?

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From: Sawnie A. McEntire <smcentire@pmmlaw.com>
Sent: Monday, June 5, 2023 10:47 AM
To: Stancil, Mark <MStancil@willkie.com>
Cc: John A. Morris <jmorris@pszjlaw.com>; Levy, Joshua S. <JLevy@willkie.com>; Roger L. McCleary <rmccleary@pmmlaw.com>
Subject: RE: [EXTERNAL] HMIT

***** EXTERNAL EMAIL *****

You should have received notice of our filing of the Motion without the Dondero declarations.

Sawnie A. McEntire
Director and Shareholder
Parsons McEntire McCleary PLLC
1700 Pacific Avenue, Suite 4400
Dallas, Texas 75201

214-237-4303 (Direct)
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smcentire@pmmlaw.com

Let me know if you have any questions.

From: Stancil, Mark <MStancil@willkie.com>
Sent: Thursday, June 1, 2023 1:52 PM
To: Sawnie A. McEntire <smcentire@pmmlaw.com>; Roger L. McCleary <rmccleary@pmmlaw.com>
Cc: John A. Morris <jmorris@pszjlaw.com>; Jeff Pomerantz <jpomerantz@pszjlaw.com>; Levy, Joshua S. <JLevy@willkie.com>; Brennan, John L. <JBrennan@willkie.com>; brent.mcilwain@hklaw.com; david.schulte@hklaw.com; Gregory V. Demo <GDemo@pszjlaw.com>
Subject: [EXTERNAL] HMIT

Sawnie and Roger—

At last week's status conference, Judge Jernigan stated that the materials attached to your motion for leave had not been withdrawn because they still appear on the docket and the motion for leave continues to rely upon them. Specifically, the Court stated: "If you want to refile the motion, merely redacting those sentences that refer to the Dondero affidavit and not filing the Dondero affidavit, I'll let you." (Conf. Tr. at 48:17-22, 59:9-17.) HMIT has not refiled a redacted version of its motion.

There should be no doubt about whether or not HMIT has withdrawn the materials. If HMIT wishes to do so, it should refile the motion (without exhibits) in redacted form, as instructed by Judge Jernigan. That should occur no later than Monday, June 5, 2023 at 10:00 AM Central Time to allow defendants sufficient time to adjust their witness and exhibit lists for the upcoming hearing accordingly. If HMIT has not complied with Judge Jernigan's instructions by that time, we will proceed on the understanding that the materials remain attached to and relied upon by the motion.

We otherwise reserve all rights.

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Attorneys for Hunter Mountain Investment Trust

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	**Chapter 11**
	§	
	§	**Case No. 19-34054-sgj11**
Debtor.	§	

HUNTER MOUNTAIN INVESTMENT TRUST'S UNOPPOSED MOTION TO FILE EXHIBIT UNDER SEAL

Hunter Mountain Investment Trust ("HMIT"), files this Unopposed Motion to File Exhibit Under Seal ("Motion"), and respectfully states as follows: [1]

[1] This Motion is filed subject to and without waiving HMIT's substantive and procedural rights including, but not limited to, HMIT's objections to the evidentiary format of the Motion for Leave Hearing, including as ordered by the Court's May 22, 2023, Order Pertaining to the Hearing on Hunter Mountain Investment Trust's Motion for Leave to File Adversary Proceeding [DE ## 3699 & 3760] (Doc. 3787) ("May 22 Order"). HMIT's prior objections to an evidentiary hearing on "colorability," and applying an evidentiary burden of proof to HMIT's Motion for Leave, were asserted by HMIT during the April 24, 2023, Status Conference,

RELEVANT BACKGROUND

1. HMIT's *Emergency Motion for Leave to File Verified Adversary Proceeding* [Dkt. 3699] and *Supplement to Emergency Motion for Leave to File Verified Adversary Proceeding* [Dkt. 3760] (together the "Motion for Leave") is set for June 8, 2023 at 9:30 a.m. (Central Time) (the "Motion for Leave Hearing").

2. On June 5, 2023, HMIT filed its Witness and Exhibit List in Connection with its Emergency Motion for Leave to File Verified Adversary Proceeding, and Supplement [Dkt. 3818] ("Exhibit List").

3. Included in HMIT's Exhibit List is Exhibit 5 ("Exhibit 5"), which is a compliance log which was maintained pursuant to the Shared Services Agreement and Sub-Advisory Agreement between NexPoint Advisors, L.P. and Highland Capital Management, L.P. ("HCM"). HMIT does not believe Exhibit 5 contains confidential information at this time, however, out of an abundance of caution, HMIT designated

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and were further set forth in HMIT'S Reply Brief in Support of its Motion for Leave (Doc. 3785) and during the May 26, 2023, hearing regarding Hunter Mountain Investment Trust's Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of the June 8, 2023 Hearing (Doc 3788), all of which objections are incorporated herein for all purposes ("HMIT's Evidentiary Hearing Objections").

Subject to and without waiving HMIT's Evidentiary Hearing Objections, and based on the Court's rulings relating to the evidentiary format for the Motion for Leave Hearing, HMIT also files this instrument subject to and without waiving HMIT's procedural and substantive rights relating to HMIT's efforts to take discovery in advance of the Motion for Leave Hearing including, but not limited to, the discovery HMIT requested in Hunter Mountain Investment Trust's Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of June 8, 2023 Hearing (Doc. 3791) to the extent it was denied in the Court's May 26, 2023, Order Regarding Hunter Mountain Investment Trust's Emergency Motion for Expedited Discovery or, Alternatively, for Continuance of the June 8, 2023 Hearing [Dkt. Nos. 3788 and 3791] (Doc.3800).

Exhibit 5 as "Confidential" in accordance with the *Agreed Protective Order* [Docket No. 382]. Exhibit 5 was served on all parties to the Motion for Leave Hearing proceeding, however, it was not electronically filed with the Court.

4. Pursuant to §§ 105(a) and 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Bankruptcy Rule 9077-1, and the *Agreed Protective Order* [Docket No. 382], HMIT seeks the entry of an order authorizing the HMIT to file the following under seal: Exhibit No. 5 on HMIT's Witness and Exhibit List in Connection with its Emergency Motion for Leave to File Verified Adversary Proceeding, and Supplement [Doc. 3818] ("Exhibit List").

BASIS FOR RELIEF REQUESTED

5. Confidential information may be sealed by a bankruptcy court from the public record pursuant to § 107(b) of the Bankruptcy Code, which provides in relevant part that:

> On request of a party in interest, the bankruptcy court shall, and on bankruptcy court's own motion, the bankruptcy court may – (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

6. Section 107(b) is implemented through Bankruptcy Rule 9018. In pertinent part, that rule reads:

> On motion or on its own initiative, with or without notice, the court may make any order which justice requires . . . to protect the estate or any entity

in respect of a trade secret or other confidential research, development, or commercial information.

7. On January 22, 2020, this Court entered the Agreed Protective Order,[2] which "governs any document, information, or other thing that has been or will be produced or received by a Party in the action *In re Highland Capital Management, L.P.*, Case No. 19-34054 (SGJ)," pending before this Court (the "Discovery Materials").

8. Pursuant to the terms of the Agreed Protective Order, Discovery Materials designated as "Confidential" may be disclosed to any other Party and the United States Bankruptcy Court for the Northern District of Texas and its personnel. (Agreed Protective Order ¶ 2.).

9. Exhibit 5 has been designated as confidential out of an abundance of caution because it was maintained pursuant to the Shared Services Agreement and Sub-Advisory Agreement between NexPoint Advisors, L.P. and the Debtor, Highland Capital Management, L.P. ("HCM").

10. Counsel for HMIT conferred with counsel for all counsel related to the Motion for Leave Proceedings, including counsel for Highland Capital Management, L.P., and the Highland Claimant Trust, who indicated it was unopposed to this Motion.

WHEREFORE, HMIT requests that the Court grant the relief requested in this Motion and grant HMIT such other or further relief as the Court deems proper.

[2] Dkt. 382.

DATED: June 7, 2023

Respectfully Submitted,

PARSONS MCENTIRE MCCLEARY PLLC

By: */s/ Sawnie A. McEntire*

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Attorneys for Hunter Mountain Investment Trust

CERTIFICATE OF SERVICE

I certify that on the 7th day of June 2023, a true and correct copy of the foregoing Motion was served on all counsel of record or, as appropriate, on the Respondents directly.

/s/ Sawnie A. McEntire
Sawnie A. McEntire

CERTIFICATE OF CONFERENCE

On June 6, 2023, counsel for HMIT conferred with counsel for all Respondents related to these proceedings, regarding the substance of this Motion. Counsel for all Respondents, Highland Capital Management, L.P., Highland Claimant Trust, James P. Seery, Jr., Farallon Capital Management, L.L.C., Stonehill Capital Management LLC, Jessup Holdings LLC, and Muck Holdings, LLC indicated they are unopposed to the relief sough in this motion.

/s/ Sawnie A. McEntire
Sawnie A. McEntire

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	**Chapter 11**
	§	
	§	**Case No. 19-34054-sgj11**
Debtor.	§	

ORDER GRANTING MOTION TO FILE EXHIBIT UNDER SEAL

Upon the Unopposed Motion to File Exhibit Under Seal ("Motion"), filed by Hunter Mountain Investment Trust ("HMIT"), in relation to the hearing concerning HMIT's *Emergency Motion for Leave to File Verified Adversary Proceeding* [Dkt. 3699] and *Supplement to Emergency Motion for Leave to File Verified Adversary Proceeding* [Dkt. 3760] (together the "Motion for Leave"), which is set for June 8, 2023 at 9:30 a.m. (Central Time) (the "Motion

for Leave Hearing"). The Court is of the opinion that HMIT's Motion ought to be GRANTED and is hereby orders that:

1. The Motion is GRANTED.

2. HMIT is authorized to file Exhibit 5.

End of Order

Submitted by:
PARSONS MCENTIRE MCCLEARY PLLC

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COUNSEL TO MUCK HOLDINGS, LLC,
JESSUP HOLDINGS LLC,
FARALLON CAPITAL MANAGEMENT, L.L.C., AND
STONEHILL CAPITAL MANAGEMENT LLC

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	Case No. 19-34054 (SGJ)
Highland Capital Management, L.P.[1]	Chapter 11
Debtor.	(Jointly Administered)

CLAIM PURCHASERS' JOINDER TO HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND CLAIMANT TRUST, AND JAMES P. SEERY, JR.'S JOINT MOTION TO EXCLUDE TESTIMONY AND DOCUMENTS OF SCOTT VAN METER AND STEVE PULLY

Muck Holdings, LLC ("Muck"), Jessup Holdings LLC ("Jessup"), Farallon Capital Management, L.L.C. ("Farallon"), and Stonehill Capital Management LLC ("Stonehill", and collectively, with Muck, Jessup, and Farallon, the "Claims Purchasers") join and adopt Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery Jr.'s *Joint Motion to*

[1] The last four digits of Debtor's taxpayer identification number are (6725). The headquarters and service address for Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

Exclude Testimony and Documents of Scott Van Meter and Steve Pully [Dkt. No. 3820] (the "Motion to Exclude"). For the reasons set forth in the Motion to Exclude, the Claim Purchasers respectfully request the Court grant the relief requested therein.

WHEREFORE, the Claims Purchasers respectfully request that the Court grant the Motion to Exclude and grant the Claims Purchasers such other and further relief as is just and proper.

Dated: June 7, 2023

HOLLAND & KNIGHT LLP

By: /s/ *Christopher Bailey*
Brent R. McIlwain, TSB 24013140
David C. Schulte, TSB 24037456
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COUNSEL TO MUCK HOLDINGS, LLC, JESSUP HOLDINGS LLC, FARALLON CAPITAL MANAGEMENT, L.L.C., AND STONEHILL CAPITAL MANAGEMENT LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, and served upon all parties receiving notice pursuant to the CM/ECF system on this the 7th day of June, 2023.

/s/ Christopher Bailey
Christopher Bailey